Office-Supreme Court, U.S.
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80-1838

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON, a municipal corporation,

Respondent.

On
Petition For A Writ Of Certiorari To The
Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES, PREVAILS ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE, MUST IT ALSO PROVE THAT THE RESPONDENT MUNICIPALITY ACTED RECKLESSLY AND MALICIOUSLY IN ORDER TO PREVAIL UNDER 42 U.S.C. §1983 IN STATE COURT? MORE SPECIFICALLY, IN LIGHT OF *OWEN,* CAN A MUNICIPALITY INVOKE A DEFENSE THAT IT RELIED UPON THE ADVICE OF ITS CORPORATE ATTORNEY IN ENACTING A MUNICIPAL ORDINANCE WHICH RESULTED IN THE DENIAL OF PETITIONER CHURCH'S CONSTITUTIONAL RIGHTS?

II WAS IT ERROR FOR THE COURT BELOW TO DENY PETITIONER ATTORNEYS' FEES UNDER 42 U.S.C. §1988, WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES UNDER 42 U.S.C. §1983, PREVAILED ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE REVOKING PETITIONER CHURCH'S SPECIAL USE ZONING PERMIT?

III WHERE PETITIONER CHURCH, POSSESSING A SETTLED EXPECTATION OF CONTINUED WORSHIP AT A PARTICULAR LOCATION WHICH WAS BASED ON ISSUANCE OF A SPECIAL USE ZONING PERMIT, LOST THAT PERMIT IN VIOLATION OF ITS PROCEDURAL DUE PROCESS RIGHTS AND UPON REAPPLICATION WAS DENIED ANOTHER PERMIT, WAS IT ERROR FOR THE COURT BELOW TO HOLD THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED?

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OPINIONS BELOW

The Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal, was denied by the Illinois Supreme Court on January 30, 1981. The denial appears in the appendix hereto, p. A66. The opinion of the Illinois Appellate Court in the second appeal of this case, review of which was sought in the Illinois Supreme Court, is reported at 89 Ill. App. 3d 701, 411 N.E. 2d 1030 (1st dist. 1980), and is reproduced in the appendix p. A1. The unreported opinion of the trial court below appears in the appendix at p. A38. The opinion in the first appeal of this case is reported at 53 Ill.App.3d 443, 368 N.E. 2d 644 (1st dist. 1977) and is also reproduced at p. A20 in the appendix. The first trial court's grant of summary judgment is in the appendix at A15.

JURISDICTIONAL GROUNDS

The Illinois Supreme Court's denial of the Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal, was entered on January 30, 1981. *See* pp. 8, 9, infra.

This Petition for Writ of Certiorari is being docketed in this Court within 90 days from the denial of the Petition for Appeal as a Matter of Right, or, in the Alternative, Petition for Leave to Appeal below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Art. VI, ¶2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . under the Authority of the United States, shall be the supreme Law of the Land. . .

Constitution of the United States, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . .

Constitution of the United States Fourteenth Amendment, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Fourteenth Amendment, §5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

jured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1988:

In any action or proceeding to enforce a provision of section . . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case has a more than 7 year complicated factual and procedural history. The Petitioner, International Society for Krishna Consciousness (ISKCON) is a not-for-profit corporation registered in the State of Illinois. It embodies a religious movement (Vishna) that can be traced back to a Hindu-revivalist named Chaitanya, in India in the fifteenth century. There are about 45 to 50 million adherents to the Vishna tradition in India, with

about 15 million followers of the Krishna Consciousness movement narrowly speaking. The religious practices of the Krishna Consciousness Movement are set forth in numerous volumes of holy scriptures. The rituals involved in their movement embody seven separate devotions during any twenty-four hour period. These rituals involve incantations and chanting as part of their worship.

On August 8, 1972, the Petitioner entered into a lease for the rental of the property at issue here, which is located at 1014 Emerson Street, Evanston, Illinois. This property was the only temple for the worship of Krishna in the Chicago area. It was used as a place of worship, as a place of residence for devotees, and as a school for the teaching of Krishna Consciousness. At the time of trial 45 people lived there and the worshipping community consisted of between three to five thousand people.

On February 15, 1973, the Petitioner and the property-owner applied for a special use permit with the Evanston Zoning Board of Appeals.

On March 20, 1973, the Zoning Board of Appeals, after a public hearing, found that the special use standards were met and recommended a special use permit be granted.

On November 20, 1973, after further public hearings, the Zoning Board of Appeals again entered findings that the proposed use conformed to the special use standards and recommended a special use permit be granted.

On March 25, 1974, the Evanston City Council adopted an ordinance granting the Petitioner a special use permit subject to certain conditions.

On September 18, 1974, the Petitioner requested additional time to meet the requirements of the special use permit. In anticipation of being issued an extension of the special use permit, the Petitioner entered into a contract for architectural plans to correct code violations, as well as a construction contract.

On November 4, 1974, the City Council adopted an ordinance extending the time in which the Petitioner was to achieve code compliance to February 15, 1975. One day later, on November 5, 1974, Petitioner's contractor obtained building permits and work was commenced by the contractor.

On November 7, 1974, the Corporation Counsel of the City of Evanston, in a letter to the City Manager, rendered an opinion that the ordinance adopted November 4, 1974 was invalid because no public hearings were held first. This opinion by the Corporation Counsel was accorded great significance by Respondents, as well as by the Illinois Appellate Court.

On November 11, 1974, without notice to the Petitioner, the City Council adopted a Motion rescinding the Ordinance it adopted on November 4, 1974. Immediately after this action, the building permit issued to Petitioner's contractor was revoked, although the contractor was permitted to proceed with some work without permits where health and safety considerations were involved. Petitioner paid the contractor for such service. In all, the contractor was paid $19,606.07.[1]

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[1] The trial court sustained an objection to the contractor's testimony as to increased costs to complete work specified in the contractor's verified statement but which could not be completed after the permits were revoked. An offer of proof was made that $5,104.00 in damages resulted to plaintiff.

On February 20, 1975, Petitioner entered into an installment contract for a warranty deed for the property. On May 16, 1975, the Petitioner, now as contract purchaser, submitted a second application for special use permit. The Respondent allowed this application.

In October, 1975, the Zoning Board of Appeals held public hearings and found that the special use permit standards would be met and recommended granting a special use permit. A proposed special use permit was drafted. The Planning and Development Committee of the City Council conducted hearings on various dates.

At the committee meeting session of May 10, 1976, the application proceeded normally, and it was decided to notify the Petitioner that it "would be introduced May 24, 1976, and would be ready for adoption June 7, 1976."

On July 12, 1976, something happened to change the course of events. A written statement concerning certain alleged practices of the Krishna organization was submitted to the committee, and oral statements of objection were made by four individuals. A motion was passed recommending the City Council not concur with the Zoning Board of Appeals, but instead deny the special use permit. This motion was reaffirmed by the Committee on August 9, 1976.

The City Council met on September 13, 1976 and voted to deny the special use permit.

This action prompted the filing of a Complaint in the Circuit Court of Cook County on October 25, 1976. On November 1, 1976, Petitioner applied for a preliminary injunction, which was denied. On November 8, 1976, there was a substitution of attorneys on behalf of the Petitioner. A Motion to Reconsider was granted, and a hearing set. After the hearing, on November 16, 1976, the

Court denied the Motion for Preliminary Injunction. Petitioner amended its Complaint and answered the counterclaim of the Respondent which was filed earlier on October 29, 1976.

A Notice of Interlocutory Appeal to the Illinois Appellate Court was filed by the Petitioner on November 16, 1976. This appeal was docketed in the Appellate Court as #76-1500. Some months later, the trial court granted summary judgment to the Respondents, and on April 20, 1977, Petitioner filed its second Notice of Appeal. That appeal was docketed as case #77-573, and was consolidated with the earlier appeal. The Appellate Court reversed and remanded the case. *International Society for Krishna Consciousness, Inc.* v. *City of Evanston*, 53 Ill. App. 3d 443 (1st dist. 1977). (App. A20)

On remand, Petitioner filed its Second Amended Complaint.[2] Following a bench trial in the Circuit Court of Cook County, a Memorandum of Findings of Fact and Conclusions of Law and a Judgment Order were entered on August 21, 1978. (App. A38) Petitioner's Motions for Reconsideration of Order and Judgment and for Attorneys' Fees were both denied. (App. A64)

Petitioner filed its Notice of Appeal from certain portions of the judgment on December 29, 1978 and Respondents filed their Notice of Cross Appeal.

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[2] The Second Amended Complaint was in five counts. Counts I-IV were brought under 42 U.S.C. §1983. Counts I and II claimed Infringement of Free Exercise of Religion; Count III claimed a deprivation of due process; Count IV claimed deprivation of equal protection and due process of law; Count V claimed that the denial of the second special use permit was arbitrary and capricious; Counts VI and VII were for damages for the willful and malicious acts of the Respondent.

During the trial of this case, Petitioner was denied the right to introduce evidence of its denial of Equal Protection under the law. Offers of proof were made which Petitioner contends were relevant and material to the issue of denial of equal protection.

Because this was a significant issue in the appeal before the Appellate Court and because it is related to Petitioner's First Amendment claim, that offered testimony is summarized below.

Objections were sustained to all the following offers. Petitioner could not elicit how many applicants for special use permits had been required to make code repairs within 180 days as Petitioner was required. Petitioner could not elicit evidence concerning treatment accorded the Church of Scientology, whereby that Church was granted an extension of time exceeding three years in which to comply with the zoning ordinance. Petitioner could not elicit evidence that another applicant failed to meet imposed zoning conditions for some 3½ years.

The trial court sustained an objection to evidence concerning the relief requested by yet another applicant, Evanston Hospital. There the application was to allow redevelopment of several buildings. In November, 1973, an 18 month time limit was imposed for a zoning variance from the commencement of removal of existing parking while an expansion was added. Construction was still in progress in November, 1977. A payment in lieu of taxes covenant was not recorded until June 19, 1975, after being imposed in the original 1973 ordinance.

After the Court sustained an objection, an offer of proof was made that from January 1, 1973 to December 31, 1976, the Evanston Zoning Board of Appeals never

attached to a special use permit other than the Petitioner's a condition to achieve code compliance within a specific time period.

Similarly, the Court sustained an objection, and an offer of proof was made that from January 1, 1973 to December 31, 1976, the City Council never attached to a special use permit ordinance other than the Petitioner's a condition to achieve code compliance within a specified time period.

After an objection was sustained, an offer of proof was made that another applicant (Kendall Cleaning) asked to retain an illegal use as a nursery school before a special use permit was requested. There were numerous code violations involving health and safety. A special use permit was ultimately granted without any time limit conditions at all.

After an objection was sustained, an offer of proof was made as to a request by B'nai B'rith Foundation to convert an existing building, previously used as a residence, into a synagogue. A three-year extension was granted with respect to housing code violations.

An objection was sustained to a question concerning the Presbyterian Retirement Home. Extensions of time were granted to construct additions to the building. The extension was made in accordance with certain provisions of the Zoning Ordinance. It took the applicant from September, 1974, when the permit was granted, to December, 1977, and construction was still in progress. Respondent also introduced testimony from nearby residents that the chanting emanating from the temple caused noise and that parking and traffic problems increased. (App. A44, A45)

Finally, evidence was received during Petitioner's case in chief concerning the expenditures by the Petitioner

for legal fees arising out of their efforts to secure a special use permit for 1014 Emerson Street.

The trial court's judgment order granted Petitioner an injunction relating to Count I of the Second Amended Complaint, directing the Respondent to issue a special use permit. That part of the judgment order was not appealed from by the Petitioner. The trial court found that Respondent violated Petitioner's procedural due process rights, but that there was no violation of substantive due process or of equal protection. Petitioner was awarded $1 in nominal damages. Relief under the remaining Counts of the Complaint as well as attorneys' fees and compensatory damages were denied. (App. A52-A59) Petitioner appealed these denials to the Appellate Court.

The appellate court held (1) that the trial court properly excluded the evidence found in ISKCON's offer of proof, and that ISKCON failed to prove intentional discrimination against it (App. A7) and (2) that the revocation of the special use permit violated ISKCON's procedural due process rights, but that ISKCON "failed to meet its burden of proof . . . in failing to prove any intentional, malicious, or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11) Consequently, the appellate court dissolved the injunction mandating issuance of a special use permit, vacated the award of nominal damages, and declared that ISKCON was not a "prevailing party" entitled to attorneys' fees under the Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988.

The appellate court rendered this decision on September 30, 1980. A petition for rehearing was filed on October 21, 1980. The petition for rehearing was denied on October 28, 1980. A Petition to Appeal as a Matter of

Right, or, in the Alternative, for Leave to Appeal from the judgment of the First District Appellate Court was filed with the Illinois Supreme Court on December 3, 1980. The questions presented in this Petition were:

(1) Whether the appellate court has erroneously construed and misapplied federal law and thus is in conflict with decisions of the United States Supreme Court;

(2) Whether the question presented is that of deprivation of First Amendment free exercise of religion and related deprivation of substantive and procedural due process rights;

(3) Whether the appellate court applied an erroneous legal standard in considering the issue of discriminatory treatment; and

(4) Whether the issues presented were moot.

The Petition was denied by the Illinois Supreme Court on January 30, 1981.

ARGUMENT

INTRODUCTION

Since at least last Term, it has been clear that state courts should entertain suits brought under 42 U.S.C. §1983[3] and it is axiomatic that state court judges are obligated by the supremacy clause to follow the law

[3] That statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

established by the Supreme Court in this area and to award attorneys' fees under 42 U.S.C. §1988. *Martinez* v. *California,* 444 U.S. 277 (1980); *Maine* v. *Thiboutot,* ....., U.S. ....., 100 S.Ct. 2502 (1980). But in order to give full and complete relief, local courts, once having accepted §1983 jurisdiction, must afford litigants the complete remedy required by Congress and this Court's prior decisions. *Id.* at 2507. The seeming reluctance of state courts to afford a full and complete forum for local litigants when serious rights are involved is at the heart of the present controversy. Not only are the rights of these particular parties at stake, but wider ramifications exist: the federal court docket, already overcrowded, could be pressed still further by litigants deterred from seeking an inadequate §1983 remedy in state court.

The seminal decisions in *Monell* v. *New York City Dep't. of Social Services,* 436 U.S. 658 (1978) and *Owen* v. *City of Independence,* 445 U.S. 622 (1980), seem clear enough: municipalities are "persons" under §1983; when sued, they may not claim a qualified immunity based on the good faith of their officials; and the statutory requirements will be met when "official policy [is] the moving force of the constitutional violation." *Monell,* 436 U.S. at 694. Last Term this Court made clear that §1983 plaintiffs need allege only two claims in order to maintain a cause of action under that statute: they must allege that some person has deprived them of a federal right and that the person who did so acted under color of state law. *Gomez* v. *Toledo,* ..... U.S. ....., 100 S.Ct. 1920 (1980).[4] Those requirements

[4] Qualified immunity defenses, when available, are part of the defendant's case and need not be pleaded by plaintiffs. *Id.* Here, of course, the Respondent may not ever invoke the good faith of its officials as a defense.

were clearly met by the Petitioner. Moreover, a constitutional violation was found, as the second appellate opinion explains:

> We therefore conclude that Evanston was not justified in proceeding as it did, and that the revocation constituted a *violation* of Krishna's *procedural due process* rights which was actionable in a court of law. And the under color of law requirement was met because it was the ordinance revoking the special use permit that caused the constitutional violation.

(App. A10) [Emphasis added]

Logically, then, Petitioner church should have been afforded relief. But the Illinois Appellate Court, in the second appeal, having conceded that Petitioner church was deprived of its constitutional right to procedural due process by an official action, nonetheless imposed an additional requirement upon Petitioner:

> [T]he plaintiff must demonstrate that the defendant has violated his rights in a malicious or reckless manner. This is true when the defendant is a municipal corporation as well as in any other case.

(App. A11)

This Court should announce what its previous decisions, as well as a significant body of federal case law, have implied: the passage of an ordinance which results in a constitutional deprivation to a plaintiff is the intent requred to be shown under §1983. To hold otherwise would blunt the remedial purpose of §1983 as well as the decisions in *Monell* and *Owen*.

I WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES, PREVAILS ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE, MUST IT ALSO PROVE THAT THE RESPONDENT MUNICIPALITY ACTED RECKLESSLY AND MALICIOUSLY IN ORDER TO PREVAIL UNDER 42 U.S.C. §1983 IN STATE COURT? MORE SPECIFICALLY, IN LIGHT OF OWEN, CAN A MUNICIPALITY INVOKE A DEFENSE THAT IT RELIED UPON THE ADVICE OF ITS CORPORATE ATTORNEY IN ENACTING A MUNICIPAL ORDINANCE WHICH RESULTED IN THE DENIAL OF PETITIONER CHURCH'S CONSTITUTIONAL RIGHTS?

This Court should grant certiorari to review this question, as the standards set out in Supreme Court Rule 17 are met: the Illinois Supreme Court's failure to allow the Petition to Appeal as a Matter of Right, or in the Alternative, Petition for Leave to Appeal, lets stand the decision of the Illinois Appellate Court that Petitioner did not prove a cognizable claim under §1983 and it conflicts with this Court's decisions in *Monell* and *Owen,* with the Fourth Circuit's recent decision in *Huemmer* v. *Mayor and City Council of Ocean City,* 632 F.2d 371 (4th Cir. 1980), and with the intent standard required by the Seventh Circuit in *Bonner* v. *Coughlin,* 545 F.2d 565 (7th Cir. 1976) and its progeny. Moreover, the question raised is an important one which should be decided by this Court.

Monell indicates the clear expression of federal courts that the policy of a municipality has its highest expression

in its legislative enactments and therefore satisfies the "under color of law" requirement:

> Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, *ordinance,* regulation or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690. [Emphasis added]

The Second Circuit has declared that, under *Monell,* once the existence of an official policy is demonstrated by its embodiment in a municipal regulation (or ordinance), a fact-finder need only determine "whether the policy caused the injury to the plaintiff . . . and whether the municipality was entitled to some sort of qualified immunity" (now decided in the negative by *Owen*). *Turpin* v. *Mailet,* 619 F.2d 196, 199 (2d Cir. 1980).

In the instant case, the ordinance that revoked the special use permit caused the violation of Petitioner's constitutional rights. (App. A10) The remedy Petitioner sought included declaratory and injunctive relief; thus, even if damages were not assessed, the deprivation could have been remedied by declaring the revocation illegal and ordering the reinstatement of Petitioner's special use permit. A more difficult case is presented where the policy alleged to be unconstitutional is implicit, but that is not the case here.[5]

---

[5] It is therefore not possible to reconcile the appellate court's holding that Petitioner was denied procedural due process with its finding in light of *Owen* that the Petitioner did not prove "any intentional, malicious or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11)

The Illinois court's opinion is internally inconsistent in finding a due process violation because of an official act, yet denying all relief. An affirmative and voluntary passage of a municipal ordinance disposing of the rights of parties in general and directed to a specific plaintiff is sufficient to meet the level of intent required. If not, then "under color of" and the dictates of *Monell* and *Owen* are eviscerated. The effect of this decision is to insulate a municipality from any liability. The decision completely disregards the express holdings of this Court in *Monell* and *Owen*.

Respondent's defense was reliance upon its corporate attorney's interpretation of its own zoning ordinance. This defense was argued[6] in the first appeal of this case and at the trial level and again at the second appeal. (App. A10, A25, A41) Each time this defense was argued, it was rejected:

> At both the trial level and before this court, Evanston attempted to justify its revocation of the special use permit extension by referring to the advice given by its corporation counsel. Counsel advised the city council of Evanston that a public hearing was necessary before the "extension" ordinance could be enacted, as that ordinance was in reality an amendment, and not merely an extension of the prior ordinance. Counsel believed that, since a hearing had not been held, the "extension" ordinance passed here was invalid.
>
> In *Krishna I* (citation omitted), we ruled that this was not a sufficient justification for Evanston's summary revocation of the extension. At no time subsequent to that ruling has Evanston offered any alternative justification for its revocation action. We therefore conclude that Evanston was not justified in

[6] The Respondent never produced any evidence that in fact it relied upon this advice.

> proceeding as it did and *that the revocation constituted a violation of Krishna's procedural due process rights* which was actionable in a court of law.

(App. A10) [Emphasis added]

Nothing, therefore, should have stood in the way of granting relief here under §1983. However, the appellate court held that Petitioner was not entitled to relief due to its "fail(ure) to prove any intentional, malicious, or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights." (App. A11) The appellate court was incorrect: it required a greater intent than the law demands and it lumped three different standards (App. A11) together as if they were one and the same.

A §1983 plaintiff is not charged with the responsibility of showing the malice or recklessness of a municipal defendant (which would perhaps support punitive damages). The standard of general intent required by several circuits, including the Seventh, *see Bonner, supra; McDonald* v. *Illinois,* 557 F.2d 596 (7th Cir. 1977), *cert. denied,* 434 U.S. 966 (1977); *Jamison* v. *McCurrie,* 565 F.2d 483 (7th Cir. 1977); *Beard* v. *Mitchell,* 604 F.2d 485 (7th Cir. 1979), has been imported from the "background of tort liability" which guides construction of §1983 and "makes a man responsible for the natural consequences of his actions," *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). That intent is:

> an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. The defendant may be liable although he has meant nothing more than a good-natured practical joke, or has honestly believed that he would

not injure the plaintiff, or even where he was seeking the plaintiff's own good.

W. Prosser, Handbook Of The Law Of Torts, 4th ed., 31-32 (1971) (hereinafter Prosser)

The correct intent standard is met where, as here, Petitioner shows a voluntary, affirmative act of official policy which causes a constitutional violation. A municipal corporation can only act through its agents (here, the Evanston City Council) and the council members would have known that a revocation of a special use permit was taking place without notice and a hearing and was "substantially certain" to result in loss of Petitioner's building permits. That, as a matter of law, meets the level of intent required by tort law. *Id.*

A further source of conflict in the appellate court's opinion is that it speaks of three types of intent as if they were one. In effect, the Illinois court has required Petitioner to prove bad faith. According to Prosser, the intent with which tort liability is concerned is distinguished from negligence, malice and recklessness. *Id.* at 32. The Illinois court appeared to derive its intent standard (which it proceeded to employ incorrectly) from the Seventh Circuit's requirements as articulated in *Bonner* and its progeny, including *Beard, supra.* The *Beard* court articulated this circuit's standard as it has developed: a plaintiff must demonstrate "intention" (defined as "the general intent to perform acts, the natural consequences of which were the deprivation of a constitutional right") *or* "reckless disregard" (defined as "conscious disregard [of] a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross departure from the care which a reasonable person would exercise in this situation") *Id.*, 604 F.2d at 493. But the Illinois

court ignored the disjunctive "or", saying that malice or recklessness is required and in effect, actually required a showing of bad faith:

> Numerous federal court decisions in this federal circuit have indicated that there is no remedy available in a §1983 action which is based upon the mere negligence of the defendant resulting in a violation of the plaintiff's protected rights. (citations omitted) Rather, the plaintiff must demonstrate that the defendant has violated his rights in a *malicious or reckless manner*. This is true when the defendant is a municipal corporation as well as in any other case. (citation omitted) In this case, the trial court found that there was not sufficient evidence to indicate any *bad faith* on the part of Evanston in revoking the extension ordinance. We therefore hold that Krishna has failed to meet its burden of proof under a section 1983 action in failing to prove any *intentional, malicious, or reckless conduct* by Evanston when it circumvented Krishna's procedural due process rights.

(App. A11) [Emphasis added]

In the footnote after the above quotation, the appellate court discusses this Court's decision in *Owen* and finds it inapposite because Petitioner had not met the intent standard the appellate court believed appropriate: "[H]ad Krishna met its initial burden of proof and demonstrated that Evanston had acted in an *intentional, malicious or reckless manner*, the latter would have been unable to escape liability on any good faith immunity basis." (App. A12) [Emphasis added] It is evident from these quotations that the court misapplied the intent requirement. The first time it refers to intent, it speaks of a "malicious or reckless manner" and then says that Petitioner failed to show any bad faith on the part of Respondent. The confusion is then heightened when, sev-

eral sentences later and in the corresponding footnote, it refers to, presumably, the same intent standard as requiring a showing of "intentional, malicious or reckless" conduct. The effect is that bad faith is the intent standard which emerges from the court's discussion. Clearly, this is error and the appellate court's misreading of the Seventh Circuit's standard of intent creates a conflict between its opinion and those cases. Moreover, none of those Seventh Circuit cases concerns a municipal defendant.

Interwoven in the appellate court's decision is the resurrection of a qualified immunity defense rejected in *Owen.*[7] The appellate court rejected the basis upon which the revocation was couched: requiring a public hearing. Seemingly, the court transfers the responsibility for the Respondent's actions to the advice of the City attorney. This advice would appear to be the basis of Respondent's immunity. But municipal corporations can only act through their agents. And whether the attorney's advice was correct or incorrect, rendered in good faith or not, is irrelevant when determining the voluntariness of the actions of the City Council. Neither the City Council members nor their attorney are defendants in this action. Does a litigant (as the logic of the appellate court's opinion implies) have a cause of action against the City

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[7] Indeed, the *Owen* Court specifically pointed out that municipal defenses are controlled by federal law and quoted *Hampton* v. *City of Chicago,* 484 F.2d 602, 607 (7th Cir. 1973): "A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." *Owen,* 100 S.Ct. at 1414.

Attorney for malpractice? Negligence? There is no alternative remedy.[8]

Moreover, the Illinois Appellate Court's opinion directly conflicts with the Fourth Circuit's opinion in *Huemmer, supra,* 632 F.2d at 372, where the City was found liable under §1983 for a denial of procedural due process and its defense, "reliance on an apparently regular ordinance whose constitutionality had never been questioned," was disallowed under *Owen.* The court equated this defense with the qualified immunity struck down in *Owen*:

> The Supreme Court's holding makes inappropriate any consideration of the question whether the city had a basis for contending it was acting in good faith since the ordinance had never previously been attacked, even though, from closely related cases, the unconstitutionality of the ordinance was evident.

Huemmer at 372, fn. 4.

After *Monell* and *Owen,* it is sufficient to meet the requisite level of intent for a plaintiff to demonstrate that official policy or an official enactment caused a constitutional violation, *supra* at 16. These cases stand for the proposition that §1983 was intended to provide a remedy for those who are able to show that a munici-

---

[8] "[T]here is no remedy available in a §1983 action which is based upon the mere negligence of the defendant resulting in a violation of the plaintiff's protected rights. . ." (App. A11)
"Counsel advised the city council of Evanston that a public hearing was necessary before the 'extension' ordinance could be enacted. . . (App. A10)
The reference to "mere negligence" seems clearly related to the inaccurate or erroneous advice offered by the City Attorney and accepted by the City Council.

pality, acting under color of state law, caused a constitutional violation.* Nothing additional is required:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen, 100 S.Ct. at 1416.

II WAS IT ERROR FOR THE COURT BELOW TO DENY PETITIONER ATTORNEYS' FEES UNDER 42 U.S.C. §1988, WHERE PETITIONER CHURCH, SEEKING INJUNCTIVE AND DECLARATORY RELIEF AND/OR DAMAGES UNDER 42 U.S.C. §1983, PREVAILED ON ITS CLAIM THAT ITS DUE PROCESS RIGHTS WERE DENIED BY THE PASSAGE OF A CITY ORDINANCE REVOKING PETITIONER CHURCH'S SPECIAL USE ZONING PERMIT?

Section 1988 provides: "In any action or proceeding to enforce a provision of section . . . 1983 . . . , the

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*The appellate court recognized that impact of *Carey* v. *Piphus,* 435 U.S. 247, 266 (1978) as it affects the violation of a plaintiff's procedural due process rights: "[P]rocedural due process rights are viewed as absolute in a sense because of their importance to organized society. Thus, deprivation of such rights, even without a showing of actual injury, nevertheless requires vindication of those rights through the award of nominal damages." The logic of *Carey,* then, to this case, is that Petitioner's substantive rights were violated and not its "mere" procedural rights. In other words, the Petitioner here would be entitled to substantial damages "even without a showing of actual injury." *See Konczak* v. *Tyrrell,* 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 668 (1980).

court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." There can be no question that Petitioner church is a prevailing party in the instant litigation by whatever standard a court applies. *Maher* v. *Gagne*, ... U.S. ....., 100 S.Ct. 2570 (1980); *Thiboutot, supra*, 100 S.Ct. 2502; *New York Gaslight Club, Inc.* v. *Carey*, ... U.S. ....., 100 S.Ct. 2024 (1980). The opinion of the Illinois Appellate Court conflicts directly with the above decisions of this Court and most of the federal circuits.[10]

The touchstone is that Petitioner essentially succeeded in obtaining the relief it was seeking. *Maher, supra*, 100 S.Ct. at 2575. On the merits, a due process violation was found, *supra*, at 14-15. As quoted in *Maher* at 2575: "[T]he Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S.Rep. No. 94-1011, p. 5 (1976)." As the Court confirmed in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), Title VII [1983] plaintiffs are the chosen instrument of Congress to vindicate the rights of parties.

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[10] *See Perez* v. *Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978); *Skehan* v. *Bd. of Trustees*, 590 F.2d 470 (3d Cir. 1978); *Bonnes* v. *Long*, 599 F.2d 1316 (4th Cir. 1979); *Williams* v. *City of Fairburn, Georgia*, 640 F.2d 635 (5th Cir. 1981); *Ramos* v. *Koebig*, 638 F.2d 838 (5th Cir. 1981); *Northcross* v. *Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Entertainment Concepts, Inc. III* v. *Maciejewski*, 631 F.2d 497 (7th Cir. 1980); *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Pickett* v. *Milam*, 579 F.2d 1118 (8th Cir. 1978); *Sethy* v. *Alameda County Water Dist.*, 602 F.2d 894 (9th Cir. 1979).

Therefore, attorneys' fees are awarded routinely to plaintiffs, whereas defendants can only be awarded fees where evidence exists of bad faith on the part of plaintiffs. *Id.* at 416, 417.

It was manifestly unnecessary for Petitioner to show bad faith on the part of the municipality here in order to be entitled to relief, including attorneys' fees. As discussed *supra* at 17-18, a showing of bad faith is not required under *Owen*. Additionally, if a showing of bad faith were necessary, §1988 would be rendered superfluous, because the traditional common law American rule regarding attorneys' fees is to award them where bad faith is found. In fact, §1988 was enacted to partially override *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), which had reaffirmed the American rule in the absence of express legislative direction to the contrary. *See also* Note: *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act,* 80 COLUM. L. REV. 346, 350 (1980). Furthermore, the fact that neither Congress nor the courts have required a showing of bad faith in order for prevailing plaintiffs to be awarded fees under §1988 is a reflection and corroboration of the fact that such an intent standard is not part of a substantive §1983 claim either.[11]

Even where a qualified immunity is arguably available to a defendant, a plaintiff needn't demonstrate the existence of bad faith in order to defeat the immunity, for it is elementary that a lack of good faith doesn't necessarily imply the presence of bad faith. There is therefore no foundation on which to rest the Illinois

[11] The Court used this mode of reasoning in *Monell* at 608-609 to support its holding by demonstrating that Congress explicitly included municipalities as entities which might be required to pay fees under §1988.

Appellate Court's holding that Petitioner is not a prevailing party because it didn't demonstrate bad faith and that on that basis it should also be denied attorneys' fees under §1988.

Moreover, this case also raises the related question whether Petitioners should be awarded fees under §1988 when they prevail on state common-law claims derived from a nucleus of operative fact in common with their §1983 claim. Here, the trial court found that "the defendant's revocation of the extension of time without affording the plaintiff an opportunity to disprove the action was arbitrary and capricious and without procedural due process of law to the person affected thereby." (App. A46) Under *Maher,* the answer to the question posed above would seem to be yes. The Sixth Circuit, in *Seals* v. *Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977), answered this question in the affirmative, in reliance on the legislative history of §1988. *Id.* at 392-394. *See also Harradine* v. *Bd. of Suprs. of Orleans County,* 425 N.Y.S. 2d 182 (App.Div. 1980).

This question is important because the improper use of a court's narrow discretion to deny fees can damage the utility of the statute by discouraging attorneys from accepting otherwise meritorious cases. *See* Note, 80 COLUM. L. REV. at 365-366. Abuses of discretion threaten the position of attorneys' fees awards as an integral part of the §1983 remedy. Finally, when it is in state courts that fees are denied, federalism concerns are raised, *Thiboutot* at 2507, fn. 12. State courts may not ignore the rules laid down by Congress and this Court. By abusing its discretion to deny fees, the Illinois Appellate Court is in effect driving more future plaintiffs into federal court and away from state courts. The magnitude of this question is great and it demands resolution.

III WHERE PETITIONER CHURCH, POSSESSING A SETTLED EXPECTATION OF CONTINUED WORSHIP AT A PARTICULAR LOCATION WHICH WAS BASED ON ISSUANCE OF A SPECIAL USE ZONING PERMIT, LOST THAT PERMIT IN VIOLATION OF ITS PROCEDURAL DUE PROCESS RIGHTS AND UPON REAPPLICATION WAS DENIED ANOTHER PERMIT, WAS IT ERROR FOR THE COURT BELOW TO HOLD THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED?

The direct and natural consequence of the Respondent's affirmative and voluntary act in denying Petitioner's extension of time for its special use permit was to deny it the free exercise of religion. The trial court was content to rest its opinion on the substantial but narrow prong of procedural due process. (App. A47, A48) The consequence of this decision has been to confuse substance with procedure and to create a strained and contorted dichotomy. The barrier thus erected leads inevitably to the subordination of our most precious freedom to the whim of governmental officials. Inevitably a first amendment case involves a due process claim as well. This is so whether a licensing ordinance is at stake as in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), or *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610 (1976) or *Freedman* v. *Maryland,* 380 U.S. 51 (1965) or a zoning ordinance is brought into question, *Columbus Pk. Congregation* v. *Bd. of Appeals,* 25 Ill.2d 65 (1962).

Protection of the free exercise of religion has been accorded a special place in our jurisprudence. *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Bd. of Education* v. *Barnette,* 319 U.S. 624 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). Burdens upon this free

exercise have been highly disfavored by this Court. And those burdens may be indirect as well as direct. *Thomas* v. *Review Board,* ..... U.S. ....., 49 U.S.L.W. 4341 (1981); *McDaniel* v. *Paty,* 435 U.S. 618 (1978); *Sherbert, supra; Braunfeld* v. *Brown,* 366 U.S. 599 (1961).

That it is freedom of religion that is involved here is further evidenced by the claim of Respondent that the Petitioner's religious observances or practices are objected to, *supra* at 7. The "noise" referred to was ISKCON's members' chanting, an integral part of their religious worship, *supra* at 2. Nonetheless, the Illinois Appellate Court characterized this controversy as "essentially a zoning dispute" (App. A1) and it refused to uphold the trial court's finding that "the denial of the plaintiff's right of worship at this location, upon the speculative fears of parking and traffic congestion, bears no reasonable relation to the general health, safety, morals or welfare of the defendant." (App. A45) Although a municipality's police powers as exercised in its zoning restrictions are broad, they do not override the mandate of the Constitution. *Moore* v. *East Cleveland,* 431 U.S. 494 (1977). The question presented here involves a conflict between those rights.

The burden imposed on religion here—the denial of ISKCON's right to worship at this location—is substantial, albeit indirect. Although it could be argued that ISKCON is free to worship in another location, that argument is insufficient to defeat the very real existence of a burden on worship in this situation. The importance of unimpeded, uninterrupted ability to worship is central to the confidence worshippers require in order for a church to continue and thrive. Being forced to move elsewhere can be not only a very disruptive experience, but the end result of prohibiting worship in such commercially-zoned

areas as the one at issue here could be tantamount to the forced migration declared unconstitutional in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *See also Columbus Park, supra.* Thus, the burden imposed on religion here is no more collateral than other indirect burdens on the free exercise of religion struck down by this Court. See *Thomas, supra; McDaniel, supra.* In the analogous area of free speech, this Court has stated: "(O)ne is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939). *See also Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 757, fn. 15 (1976); *Spence* v. *Washington*, 418 U.S. 405, 411, fn. 4 (1974). Surely the free exercise of religion merits similar protection.

When first amendment claims arise, the legal test is to determine the compelling need of the municipality over the rights of the one enjoying first amendment protection. It is also required to determine whether the government could have pursued a less restrictive alternative to meet its legitimate goals. The burden is on this Respondent with respect to the above. *Thomas* at 4344; *Yoder, supra*, 406 U.S. at 215. This Court should grant plenary review in this case to decide that where such a serious clash arises between competing first amendment and zoning interests, the standards employed in *Thomas, McDaniel* and *Sherbert* should govern in the zoning context presented here.

Furthermore, the first amendment question was compounded by the discriminatory treatment accorded Petitioner. Since the appellate court held that first amendment rights were not involved, it applied an incorrect legal standard when considering this issue. Requiring that purposeful and intentional discrimination be shown, a standard adopted from non-first amendment equal protection

analysis, the Illinois court refused evidence as immaterial and irrelevant which would have shown dissimilar treatment of other religious and social service groups in Evanston, *supra* at 6-7. These groups obtained special use permits in analogously zoned areas, although their presence would result in similar concerns about traffic and noise. Moreover, they did not have the same restrictive time limits imposed on their permits as did Petitioner, *supra* at 7. Employing the test of *Walz* v. *Tax Commission* 397 U.S. 664, 669 (1970)—that it is the effects of state action that are crucial when a first amendment religious discrimination issue is raised—the evidence should have been admitted.

This question is important and asks for resolution by this Court because of the clash of strong interests involved. The Court has not answered this precise question in the zoning context. First amendment rights cannot be lost sight of in the name of broad powers of zoning.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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80-1838

No.

Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,
Petitioner,

vs.

THE CITY OF EVANSTON, a municipal corporation,
Respondent.

On
Petition For A Writ Of Certiorari To The
Illinois Appellate Court, First District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

No. 79-501

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Plaintiff-Appellant, Cross-Appellee,

v.

CITY OF EVANSTON,

Defendant-Appellee, Cross-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Dom Rizzi, Judge Presiding.

Mr. JUSTICE DOWNING delivered the opinion of the court:

In a civil rights action brought under 42 U.S.C. §1983 (1976), involving what is essentially a zoning dispute, plaintiff International Society for Krishna Consciousness, Inc. (Krishna) charged that defendant City of Evanston (Evanston) violated Krishna's constitutional rights of due process and equal protection by its actions concerning Krishna's application for a special use permit for its property located in Evanston. Early in the proceedings, the trial court entered summary judgment for Evanston, and Krishna appealed to this court. In *International Society for Krishna Consciousness, Inc.* v. *City of Evanston* (1st Dist. 1977), 53 Ill. App. 3d 443, 368 N.E.2d 644 (*Krishna I*), we reversed the trial court and remanded the case for trial. Trial was held. The trial court found that Evanston had violated only Krishna's procedural due process rights by its activities. Nominal damages ($1.00) were awarded and a mandatory injunction requiring Evanston to issue a special use permit to Krishna was entered. Both parties appealed.

On review, the parties ask us to decide whether (1) the trial court erred in finding that Evanston violated Krish-

na's procedural due process rights or in failing to find that Evanston violated Krishna's substantive due process and equal protection rights, (2) the trial court erred in entering an injunction requiring Evanston to issue a special use permit containing certain conditions which Krishna claims are illegal, and (3) the trial court erred in failing to award Krishna compensatory damages or to grant attorney's fees allegedly available under a federal statute.

Krishna took leasehold possession in October 1972 of property located in an area zoned by Evanston for commercial uses. At the time a special use permit was required in order to use the property as desired (temple, theological school, and residence). Application was made by Krishna for this permit. Seventeen months later, Evanston passed an ordinance granting the special use permit to Krishna conditioned, among other things, upon the correction of all existing building code violations within 180 days.

In September 1974, seven days before this time period was to expire, Krishna petitioned Evanston for an extension of time to correct the violations. Prior to receiving the extension, Krishna entered into various contracts for work necessary to achieve code compliance "in anticipation" of the requested extension.

On November 4, 1974, Evanston did in fact grant an extension which was to have been valid until February 15, 1975. One week after the extension was granted, on the advice of Evanston's corporation counsel and without notice and hearing to Krishna, the extension was rescinded. Krishna thereafter was notified of the action. The effect was to render much of the work intended to be done under the contracts impossible due to the subsequent impossibility of procuring building permits.

Nevertheless, Krishna continued use of the premises and entered into an installment land contract to buy the property in February 1975. Three months later, application for a second special use permit was filed with

Evanston. The latter undertook "standard" procedures on this application, including public hearings before the Zoning Board of Appeals as well as legislative hearings before Evanston's Planning and Development Committee of City Council. The recommendations of these two bodies regarding the application were diametrically opposed. On September 13, 1976, Evanston accepted the recommendation of the latter group and denied the application. This court action resulted from Evanston's ensuing order to Krishna to vacate the premises for violation of the zoning ordinance.

At trial following this court's reversal of an earlier-granted summary judgment for Evanston (*Krishna I*), Krishna called numerous and varied witnesses. Several witnesses described the practices of the Krishna movement, apparently to demonstrate that Krishna qualified as a religious group, to bolster its constitutional arguments. A contractor and an architect testified to dealings with Krishna concerning work to be done in order to put the property in compliance with the building code pursuant to the conditions of the special use permit. Members of Krishna's management staff also testified about these transactions and about dealings with Evanston in an effort to secure approval for the permanent use of the property. One of Krishna's attorneys testified as to litigation expenses incurred in this process. An appeals officer from Evanston's Department of Amendments and Appeals testified as part of Krishna's unsuccessful attempt to prove a contrast between the treatment given Krishna's application and that given other special use permit applicants. (The trial court did not allow this last evidence into the record.)

Evanston called a real estate consultant, two building inspectors, and residents of the locale of Krishna's property. Evanston apparently called these witnesses because it was proceeding to trial solely on the theory that it need only justify the denial of the second special use application. However, it must be pointed out that at no time was this proceeding undertaken as a typical zoning case

(*e.g.*, administrative review, declaratory judgment, or mandatory injunction). Rather, this action was clearly brought and tried under federal statute for the alleged violation of Krishna's constitutional rights by Evanston.

The closing arguments to the trial court indicated that, as then noted by Krishna's attorney, the parties had conducted two separate cases, neither of which was very responsive to the other. The trial court, in a detailed and thoughtful judgment memorandum, found that Evanston had violated only Krishna's procedural due process rights through the revocation of the extension of the initial special use permit without prior notice or hearing, and that the evidence did not show this action of Evanston to have been taken in bad faith. An award of nominal damages was entered as well as a mandatory injunction directing Evanston to again issue a special use permit of similar nature as that permit originally granted to Krishna.

At oral argument before this court, Krishna's attorney responded to inquiry that they had never approached Evanston during the ensuing period to obtain the permit ordered to issue by the trial court. Evanston's counsel then informed this court that Krishna had in fact vacated the property in question approximately two months prior to oral argument. Asked to verify this fact, Krishna's attorney admitted that Krishna had vacated the property, but stressed that the group still held legal title thereto.

I.

Krishna contends that the trial court erred in failing to find that Evanston violated its substantive due process rights and its equal protection rights in addition to its procedural due process rights when Evanston revoked and did not reissue a special use permit. Evanston counters with the argument that it violated none of these rights.

A.

Before this court will address itself to the merits of a party's contention, it must be assured that some purpose will be served by its ruling thereupon. This court will consider only actual controversies. We will not declare rules of law which can have no beneficial impact upon the party seeking relief. *Bluthardt* v. *Breslin* (1979), 74 Ill. 2d 246, 250, 384 N.E.2d 1309; *DuPage Trust Co.* v. *City of Wheaton* (2nd Dist. 1976), 38 Ill. App. 3d 159, 161-62, 347 N.E.2d 752, *leave to appeal den.*, 63 Ill. 2d 556.

Krishna asks this court to consider its substantive due process claim.[1] However, Krishna admitted at oral argument that the property upon which this entire cause of action is based is no longer occupied by the group, but now stands vacant. Regardless of this court's ruling on the validity of the Evanston zoning ordinance in question in responding to this issue, no benefit therefrom will befall Krishna. We therefore decline to rule upon this contention, instead holding it to have become moot.[2]

---

[1] Substantive due process, generally speaking, requires that a state enact reasonable legislation capable of reasonable application when it seeks to deprive a person of life, liberty, or property for the health, safety, welfare or morals of the community. The focus of this type of constitutional scrutiny of governmental activity is on the substantive legislation itself. Arbitrary laws infringing on constitutionally protected rights are proscribed; if such laws are enacted they will be struck down. *Anderson* v. *Wagner* (4th Dist. 1978), 61 Ill. App. 3d 822, 826, 378 N.E.2d 805, *aff'd* (1979), 79 Ill. 2d 295, 402 N.E.2d 560. See generally Annot. (1954), 98 L. Ed. 851, 852 & n. 5; 16 Am. Jur. 2d *Constitutional Law* §816 (1979).

[2] Due to the nature of the argument propounded by Krishna here, we do feel constrained to comment upon its efficacy and thereby hopefully avoid any confusion. In its appellate briefs, Krishna's argument focused upon the actions taken or the methods used by Evanston in the course of the permit application proceedings. While

B.

The United States Supreme Court has set out the test to be applied when a contention is made on equal protection grounds that a law is being applied in a discriminatory manner.

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination. * * * A discriminatory purpose is not presumed * * *; there must be a showing of 'clear and intentional discrimination.'" (*Snowden* v. *Hughes* (1944), 321 U.S. 1, 8, 88 L. Ed. 497, 64 S. Ct. 397.)

See also *Jackson* v. *Marine Exploration Co., Inc.* (5th Cir. 1978), 583 F. 2d 1336, 1347.

In assessing Krishna's equal protection violation claim, the trial court was faced with an evidentiary problem. Krishna sought at trial to demonstrate the alleged disparate treatment by Evanston between itself and other so-called "similarly situated" properties. Upon Evanston's objection, an offer of proof was made. The offer

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[2] (Continued)
Krishna's second amended complaint and several trial-level briefs argued that Evanston's zoning ordinance was void on its face due to constitutional infirmities (an attack which would fall within substantive due process theory), that theory was not the basis of any evidence presented at trial. At oral argument before this court, Krishna's attorney explicitly stated that they had waived any contention regarding the facial invalidity of the zoning ordinance. Neither does Krishna challenge the validity of legislation requiring religious facilities to acquire special use permits in order to operate in certain limited areas where they are zoned as non-permitted uses. Therefore, we are unable to find a cognizable substantive due process issue in Krishna's argument to this court.

substantively consisted of the procedures utilized by Evanston upon the following properties: a request to retain a special use permit on a nursery school in an area zoned U-2 (Krishna's property is zoned C-2), a request for a special use permit to make additions to a retirement home in an area zoned R-5, and a request for a special use to convert a residence to a synagogue in an area zoned R-1. (Other properties were referred to, but the foundation for those situations was so lacking that they do not merit consideration here.) The court rejected the offer of proof and sustained the objection of Evanston, reasoning that the differences in the uses and the zoning classifications between the properties made the evidence irrelevant and immaterial.

Krishna attacks this decision, arguing that the trial court had a "highly restrictive, narrow perspective" which rendered proof on this claim impossible. This contention lacks merit. Equal protection theory is not so extensive as to encompass a comparison of non-similar circumstances to demonstrate unequal treatment.[3] The mere fact that a property owner has applied for a special use permit does not place the applicant within a single class which can serve as a model to which all special use application proceedings must conform. We are of the opinion that the trial court correctly excluded the evidence found in Krishna's offer of proof. The trial court had no evidentiary basis in the record upon which to find that Evanston had demonstrated clear and intentional discrimination in its treatment of Krishna's special use permit application. The trial court therefore correctly ruled that Krishna had failed to prove violation of its equal protection rights by Evanston.

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[3] For a general discussion of the parameters of equal protection theory, see *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, (1937), 301 U.S. 459, 461, 81 L. Ed. 1223, 57 S. Ct. 838; *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.* (1923), 262 U.S. 544, 550, 67 L. Ed. 1112, 43 S. Ct. 636; *Polar Ice Cream & Creamery Co.* v. *Andrews* (N.D. Fla. 1962), 208 F. Supp. 899, 903, *reversed on other grounds* (1964), 375 U.S. 361.

C.

Procedural due process is a constitutional right which requires, at a minimum, that a party be given notice and a hearing at a meaningful time and in a meaningful manner when government action is to affect that party's constitutionally recognized rights. (*Fuentes* v. *Shevin* (1972), 407 U.S. 67, 80, 32 L. Ed. 2d 556, 92 S. Ct. 1983.) It is Krishna's contention that Evanston denied Krishna's procedural due process rights when the city council of Evanston passed an ordinance extending the life of Krishna's special use permit and then one week later summarily revoked that extension.[4]

The cause of action pursued by Krishna against Evanston on this matter constitutes a claim for relief from what has become known as a "constitutional tort." This term has been used to describe an area of the law encompassing that which is not quite a private (common law) tort, but which contains tort elements; it is not a "constitutional law" matter per se, but it employs a constitutional test. (See Shapo, *Constitutional Tort*: Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. L. Rev. 277, 323-24 (1965).) Involved in such a claim is an alleged deprivation of one of the rights secured by the Constitution

[4] Evanston does not take issue with the question of whether Krishna has a constitutionally recognized interest here which falls within the ambit of protection provided by the due process clause of the Fourteenth Amendment. For the purposes of this case only, then, we will assume that the issuance of the original permit, coupled with the later extension of it, created a protectible property interest in Krishna. Thereafter, under this assumption, Evanston could affect that interest only by actions consonant with the due process protections of the Constitution. We explicitly wish to make clear, however, that this assumption is made only as to the particular facts of this specific case, and that we are in no way ruling that a constitutionally recognized property interest exists in all zoning cases involving the issuance of a special use permit. That question is left for another day.

(the tort) by one acting under color of state law. See *Monroe* v. *Pape* (1961), 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473.

Krishna pursued its claim for the alleged violation of its procedural due process rights under section 1983. That provision creates a species of tort liability in the alleged "constitutional tortfeasor." (*Imbler* v. *Pachtman* (1976), 424 U.S. 409, 417, 47 L. Ed. 2d 128, 96 S. Ct. 984.) The central purpose of that statute is to provide a remedy in the law to those who are able to prove that they have suffered such a constitutional tort. *Carey* v. *Piphus* (1978), 435 U.S. 247, 254, 55 L. Ed. 2d 252, 98 S. Ct. 1042; *Imbler* v. *Pachtman, supra,* 424 U.S. at 433 (White, J., concurring).

In deciding the merits of some types of actions brought pursuant to section 1983, principles of common law torts are often directly analogized to define, among other things, the scope of recovery available to the successful plaintiff. In other cases under that statute, the analogy cannot be drawn, and instead the common law tort rules must be adapted to the constitutional area so as to provide fair compensation for injuries caused by the deprivation of a constitutional right. (*Carey* v. *Piphus, supra,* 435 U.S. at 255-59.) The Supreme Court in *Carey* has examined the applicability of these remedial rules of common law to procedural due process claims such as that involved in this case. It has concluded that substantial compensatory damages are available only when "actual injury" is proven. In the absence of such proof, the claim remains actionable, however. Procedural due process rights are viewed as being "absolute" in a sense, because of their importance to organized society. Thus, deprivation of such rights, even without a showing of actual injury, nevertheless requires vindication of those rights through the award of nominal damages. (*Carey* at 266.) With this background in mind, we now examine Krishna's claim for relief based on Evanston's alleged procedural due process violation.

At both the trial level and before this court, Evanston attempted to justify its summary revocation of the special use permit extension by referring to the advice given by its corporation counsel. Counsel advised the city council of Evanston that a public hearing was necessary before the "extension" ordinance could be enacted, as that ordinance was in reality an amendment and not merely an extension of the prior ordinance. Counsel believed that, since a hearing had not been held, the "extension" ordinance passed here was invalid.

In *Krishna I, supra,* 53 Ill. App. 3d at 453, we ruled that this was not a sufficient justification for Evanston's summary revocation of the extension. At no time subsequent to that ruling has Evanston offered any alternative justification for its revocation action. We therefore conclude that Evanston was not justified in proceeding as it did, and that the revocation constituted a violation of Krishna's procedural due process rights which was actionable in a court of law.

At trial, Krishna was unable to adequately prove any actual injury resulting from this violation. Therefore, under the principles announced in *Carey,* Krishna could not recover any compensatory damages for this constitutional tort. However, as stated in *Carey,* procedural due process rights are "absolute," and thus Krishna retained a valid argument that it was yet entitled to an award of nominal damages. The trial court assessed this claim, found it valid, and awarded Krishna $1.00 as relief to vindicate its procedural due process rights.

Initially, then, it would appear that this finding of the trial court was correct. However, there remains for discussion a matter of central importance to final resolution of this action which, for reasons not readily apparent, was not raised or discussed by either party in the briefs to this court. Our research indicates that, in cases of this type under section 1983, the mere proof of a violation of one party's constitutional due process rights by another party does not automatically entitle the former

to a remedy as against the latter. Numerous federal court decisions in this federal circuit have indicated that there is no remedy available in a section 1983 action which is based upon the mere negligence of the defendant resulting in a violation of the plaintiff's protected rights.[5] (See *Beard* v. *Mitchell* (7th Cir. 1979), 604 F. 2d 485, 494; *Jamison* v. *McCurrie* (7th Cir. 1977), 565 F. 2d 483, 486; *McDonald* v. *Illinois* (7th Cir. 1977), 557 F. 2d 596, 601-02, *cert. denied*, 434 U.S. 966.) Rather, the plaintiff must demonstrate that the defendant has violated his rights in a malicious or reckless manner. This is true when the defendant is a municipal corporation as well as in any other case. (*Stringer* v. *City of Chicago* (N.D. Ill. 1979), 464 F. Supp. 887, 889-90.) In this case, the trial court found that there was not sufficient evidence to indicate any bad faith on the part of Evanston in revoking the extension ordinance. Krishna did not attack or refute that finding before this court. We therefore hold that Krishna has failed to meet its burden of proof under a section 1983 action in failing to prove any intentional, malicious, or reckless conduct by Evanston when it circumvented Krishna's procedural due process rights.[6]

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[5] As yet, the U.S. Supreme Court has not analyzed the question of whether simple negligence can give rise to liability under section 1983. See *Baker* v. *McCollan* (1979), 443 U.S. 137, 140, 61 L. Ed. 2d 433, 99 S. Ct. 2689.

[6] *Stringer* makes reference to the "closely related doctrine" of qualified immunity which, at the time of that decision, was arguably available to a municipal defendant as an alternate basis with which to avoid liability in a section 1983 action. (*Stringer, supra*, 464 F. Supp. at 890, n. 3.) The U.S. Supreme Court decision which allowed actions to be brought against municipalities under section 1983, *Monell* v. *Department of Social Services of the City of New York* (1978), 436 U.S. 658, 701, 56 L. Ed. 2d 611, 98 S. Ct. 2018, had left the question open. However, last term the Court directly faced the issue of municipal immunity and held that a municipality could *not*

In light of this determination, it is apparent that the trial court erred in awarding even nominal damages to Krishna, since Krishna failed to meet the preliminary proof requirements which must be satisfied before any consideration of remedy can be made. We therefore vacate the award of nominal damages. In addition, we also must dissolve the injunction mandating the issuance of a special use permit, which was entered upon the same basis as the nominal damages award.[7] Since the injunction is to be vacated, we need not respond to Krishna's contention concerning the validity of the conditions attached to the initial special use permit by Evanston. That issue has become moot; our ruling thereupon would serve no purpose.

II.

Krishna contends that the trial court erred in awarding only nominal damages and in failing to award compensatory damages or grant attorney's fees pursuant to the Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988 (Supp. 1980)).

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[6] (Continued)
assert the good faith of its officers or agents as a defense to liability under section 1983. Municipalities now have no immunity in a section 1983 action from damages flowing from their constitutional violations. (*Owen* v. *City of Independence, Mo.* (1980), —— U. S. ——, —— L. Ed. 2d ——, 100 S. Ct. 1398). Thus, had Krishna met its initial burden of proof and demonstrated that Evanston had acted in an intentional, malicious, or reckless manner, the latter would have been unable to escape liability on any good-faith immunity basis.

[7] In the interim period between the trial court's entry of its judgment and the oral argument held before this court, Krishna admittedly made no efforts whatsoever to have Evanston comply with the injunction. Additionally, Krishna vacated the premises in the spring of 1980. Thus, the injunction would no longer serve a purpose and we would be required to dissolve it in any event.

In light of our holding above that Krishna has not succeeded in adequately meeting the proof requirements under section 1983 for either due process claim or for the equal protection claim, it is evident that Krishna can have no valid argument for an award of compensatory damages.[8]

Section 1988 authorizes the trial court in its discretion to award reasonable attorney's fees to the prevailing party in an action to enforce any rights recognized under the civil Rights Act of 1871 (42 U.S.C. §1981 *et seq.* (1976)). The impact of our holding above is to remove from Krishna any designation as the prevailing party in the case.[9] It thus becomes apparent that Krishna does not initially qualify for consideration for such an award. There is no need for us to address their argument on this issue.

III.

Although they were not brought into issue by the parties, the pleadings filed by Krishna in this case require our examination and comment. Following our decision in *Krishna I,* a second amended complaint encompassing seven counts was filed by Krishna. The counts in total contained 48 numbered paragraphs running 11 pages.[10] Five of the counts each prayed for both declaratory and injunctive relief. We note that the Civil Practice Act

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[8] We note that Krishna no longer occupies the premises in question. Thus, even had the trial court's decision on the procedural due process issue been affirmed, the claim for actual damages based upon the increased costs in renovating the structure has been rendered moot.

[9] Since the matter is not yet before us, we express no opinion as to the availability of a section 1988 award to Evanston as the prevailing party under our decision.

[10] Counts I and II alleged that Evanston sought to proscribe Krishna's religious activities in violation of the First and Fourteenth Amendments to the Constitution. Count III alleged that Evanston's zoning ordinance was void on its face under substantive due process theory. Count IV alleged that Krishna's equal protection and

(CPA) of this state (Ill. Rev. Stat. 1979, ch. 110, par. 1 *et seq.*) requires a plain and concise statement of the pleader's causes of action, with each stated in a separate count, separately pleaded, designated and numbered (Ill. Rev. Stat. 1979, ch. 110, par. 33(1), (2)). In our opinion, Krishna's complaint failed to meet these requirements of the CPA. Since Evanston did not raise this issue before this court, our comments here have no substantive effect on the validity of Krishna's complaint. (Ill. Rev. Stat. 1979, ch. 110, par. 42(3); *Casati* v. *Aero Marine Co., Inc.* (1st Dist. 1976), 43 Ill. App. 3d 1, 7, 356 N.E.2d 826.) We nevertheless make them in order to stress to the practicing bar the need to recognize the differences between pleadings in Illinois courts under the CPA and in federal court under the Federal Rules of Civil Procedure (Fed. R. Civ. P. 8(a).) This difference is especially relevant in an action brought in state court under a federal law, such as the present section 1983 proceeding. Notice pleading allowed under the federal rules is not sufficient under the CPA. (See Ill. Stat. Ann. ch. 110, par. 33, Historical and Practice Notes at 375 (Smith-Hurd).) The trial courts should not hesitate to dismiss an action, upon motion, which fails to meet the stricter pleading requirements of the CPA.

For the foregoing reasons, the injunction entered by the circuit court of Cook County is dissolved and the finding in favor of Krishna on the procedural due process claim is reversed. The remaining findings of the trial court are affirmed.

Affirmed in part; reversed in part.

PERLIN, P.J., and STAMOS, J., concur.

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[10] (Continued)
due process rights were violated by Evanston's denial of Krishna's second special use permit application. Count V alleged that this action was without any basis in fact. Counts VI and VII alleged separate actions at law for damages based upon Evanston's alleged wilful, malicious interference with Krishna's property rights, business affairs, and free exercise of religion.

In The

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department, Chancery Division

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Plaintiff-Counterdefendant,

vs.

CITY OF EVANSTON, et al.,

Defendants-Counterplaintiffs.

No. 76 CH 6336

FINAL JUDGMENT ORDER

This cause coming on to be heard on motion of the City of Evanston, et al., defendants-counterplaintiffs herein, pursuant to Rule 57 of the Civil Practice Act wherein the defendants-counterplaintiffs ask for summary judgment in favor of the defendants-counterplaintiffs on their answer and counterclaim heretofore filed herein, and the Court having examined said motion for summary judgment and the pleadings, together with the affidavits attached to said motion, including the verified report of proceedings heretofore had before this Court on a motion for preliminary injunction, and having examined the plaintiff-counterdefendant's motion for partial summary judgment, and the answer thereto, and being fully informed in the premises;

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. That the plaintiff-counterdefendant, International Society for Krishna Consciousness, Inc., is presently occupying the premises commonly known as 1014 Emerson Street, Evanston, Illinois, under a contract for warranty deed.

2. That the plaintiff-counterdefendant is a not-for-profit religious organization which is utilizing the subject premises as a temple, theological school and place of religious worship. That the premises are classified for C-2 commercial purposes wherein said use, and more particularly the use as a theological school and related accessory uses, is not permitted under the Zoning Ordinance of the City of Evanston except as a special use. That the present use of the subject premises by the plaintiff-counterdefendant is contrary to the Zoning Ordinance of the City of Evanston since the plaintiff-conterdefendant does not now have a special use permit from the City of Evanston.

3. That the City of Evanston is a municipal corporation of the State of Illinois located in Cook County, Illinois and possesses all powers granted to it by the Statutes and Constitution of the State of Illinois. That pursuant to such powers, the City of Evanston has heretofore adopted a Comprehensive Zoning Ordinance dividing the City of Evanston into zoning districts and providing for the granting of special use permits under the terms and conditions set forth in said ordinance.

4. That heretofore, the plaintiff-counterdefendant, International Society for Krishna Consciousness, Inc., applied for a special use permit under the provisions of the Zoning Ordinance of the City of Evanston. That on March 25, 1974, the City Council did adopt Ordinance 7-0-74 granting a special use to Earl T. Zweifel and the plaintiff-counterdefendant to allow the retention of the use of the building located at 1014 Emerson Street as a theological school with related accessory uses. That said special use was conditioned upon the correction of code violations within 180 days and conditioned upon certain other provisions, including the filing of a restrictive covenant for the payment of taxes or additional payment in lieu of taxes if the property was exempted. That said ordinance also contained a provision that a covenant to enforce the conditions be executed.

5. That the plaintiff-counterdefendant failed to comply with the provisions of the special use ordinance and that by virtue of the failure to comply with said special use permit conditions, the special use lapsed and terminated.

6. That subsequent thereto, the City Council of the City of Evanston withdrew an ordinance which would have extended the time for making code violation corrections, and the plaintiff-counterdefendant subsequently applied for another special use permit, which application after full notice and hearing was denied by the City Council of the City of Evanston.

7. That the present use of the subject premises is in violation of the Zoning Ordinance of the City of Evanston and in further violation of the Building Code, Electrical Code, Plumbing Code, and other ordinances of the City of Evanston.

8. That religious uses are subject to the requirements of the Zoning Ordinance and the police power ordinances of the City of Evanston. That the regulation of the location of churches and other religious uses under the police power is not a violation of religious freedom or the First or Fourteenth Amendments of the Constitution of the United States or in violation of the Constitution of the State of Illinois.

9. That the provisions of the Evanston Zoning Ordinance relating to the granting of special uses have been adopted pursuant to the provisions of the Statutes of the State of Illinois, and more particularly the provisions of Section 11-13-1.1 of Chapter 24 of the Illinois Revised Statutes, 1975. That the standards set forth in said Zoning Ordinance are sufficient and definite to guide the Zoning Board of Appeals of the City of Evanston and the City Council of the City of Evanston, and said Zoning Ordinance insofar as it sets standards for special uses is in all respects constitutional and valid.

10. That the Zoning Ordinance of the City of Evanston as applied to the subject property is in all respects constitutional and valid, and the application of said Zoning Ordinance to the subject property does not deprive the plaintiff-counterdefendant of equal protection or due process of law.

11. That the plaintiff-counterdefendant has suffered no damages or hardship other than those self-created, and the City of Evanston has in no way damaged the plaintiff-counterdefendant herein or interferred with the equitable ownership of its property or impaired contractual relations. That the City of Evanston is not liable for any damages to the plaintiff-counterdefendant by virtue of the enforcement of its valid applicable ordinances.

12. That the defendants-counterplaintiffs have authority under the provisions of Section 11-13-15 of Chapter 24 of the Illinois Revised Statutes to prevent the unlawful maintenance or use of the premises and to prevent any illegal act or to restrain or abate any violation of the Zoning Ordinance. That the defendants-counterplaintiffs under the provisions of Section 11-31-2 of Chapter 24 of the Illinois Revised Statutes have the authority to seek an injunction requiring compliance with the applicable ordinances of the City of Evanston.

13. That the Court finds from its examination of the motions and answers thereto, all pleadings in the file, all affidavits, and the report of proceedings had before it in connection with the plaintiff-counterdefendant's motion for a preliminary injunction, that there is no genuine issue as to any material fact, and that the moving parties, the City of Evanston, et al., are entitled to judgment in accordance with their motion for summary-judgment.

14. That judgment be and it is hereby entered in favor of the defendants-counterplaintiffs, City of Evanston, et al., in accordance with their motion for summary judgment.

WHEREFORE, IT IS HEREBY ORDERED and DECREED as follows:

A. That the amended complaint for injunction, declaratory judgment and damages heretofore filed herein be and it is hereby dismissed with prejudice, and judgment entered on behalf of the defendants, City of Evanston, et al.

B. That judgment be and it is hereby entered in favor of the defendants-counterplaintiffs, City of Evanston, et al., on their counterclaim, and against the plaintiff-counterdefendant on the counterclaim of the City of Evanston.

C. That the plaintiff-counterdefendant, International Society for Krishna Consciousness, Inc., and all persons claiming by, through and under it, be and they are hereby permanently restrained and enjoined from using or occupying the premises at 1014 Emerson Street as a theological school, temple or other related accessory uses, or in any manner violating the Zoning Ordinance, Building Code, Electrical Code or other ordinances of the City of Evanston with respect to the use of said premises, and said International Society for Krishna Consciousness be and it is hereby ordered to terminate said use and occupancy of said premises thirty (30) days after the entry of this order.

D. That the people's writ of injunction shall issue forthwith in accordance with the prayer of said counterclaim.

E. That this is a final judgment order, and no just reason exists for the delay of an appeal, if any.

ENTER: Judge Raymond K. Berg,
Circuit Court Judge

Nos. 76-1500)
77-573)

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., an Illinois not-for-profit corporation,

Plaintiff-Appellant,

vs.

CITY OF EVANSTON, a municipal corporation, et al.,

Defendants-Appellees.

Appeals from the Circuit Court of Cook County.
Honorable Raymond K. Berg, Judge Presiding.

Mr. PRESIDING JUSTICE DOWNING delivered the opinion of the court:

These consolidated appeals concern the continued occupancy by plaintiff, International Society for Krishna Consciousness, Inc., of premises commonly known as 1014 Emerson Street in Evanston, Illinois. Plaintiff, a not-for-profit religious organization, utilizes the premises as a temple, theological school, and place of religious worship. Although the premises are classified for C-2[1] commercial purposes, the use of the premises as a theological school and related accessory uses are prohibited without a special use permit. The cases before us exemplify plaintiff's protracted efforts to secure such a permit from defendants, the City of Evanston and others.

Case no. 76-1500 is an interlocutory appeal from an order of the trial court which denied plaintiff's request for a preliminary injunction. The preliminary injunction would have restrained defendants from proceeding against plaintiff pending final resolution of the lawsuit.

[1] The C-2 district in the City of Evanston Zoning Ordinance is one of the commercial zoning districts which permits a number of commercial uses. A variety of special uses may be authorized, including theological school buildings and uses.

Case no. 77-573 is an appeal from an order of the trial court which granted summary judgment in defendants' favor, which denied plaintiff's cross-motion for partial summary judgment, which dismissed plaintiff's amended complaint, which granted judgment in defendants' favor on their counterclaim, and which issued a writ of injunction as prayed for in defendants' counterclaim. That injunction permanently restrained and enjoined plaintiff from using or occupying the premises in question as a theological school, temple or related accessory uses, or from, in any manner, violating the Zoning Ordinances, Building Code, Electrical Code, or other ordinances of the City of Evanston. The two cases were consolidated by order of this court.

Plaintiff contends in its interlocutory appeal that the court below abused its discretion in denying plaintiff's request for a preliminary injunction. When the court denied the request, it permitted plaintiff to file an amended complaint for injunction, declaratory judgment, and damages, and the court also allowed plaintiff an extension of time to answer defendants' counterclaim. These matters culminated in the second appeal. In case no. 77-573, defendants moved for and were granted summary judgment. Plaintiff raises the following issues in its appeal from that final judgment: (1) whether summary judgment was properly granted; (2) whether the city's decision to revoke or withdraw a certain ordinance was arbitrary, capricious, and unreasonable; (3) whether the city's decision to deny a second application for a special use permit was arbitrary, capricious, and unreasonable; (4) whether the denial of the second application violated plaintiff's constitutional right to freely exercise its religion; (5) whether the second application was denied for reasons having no substantial relationship to public safety, health, morals, or welfare; (6) whether the provisions of the Municipal Code of Evanston dealing with special use permit application procedures are constitutionally sufficient; and (7) whether the city is estopped to assert a legal position incon-

sistent with its enactment which originally granted plaintiff an extension of time for its special use permit.

A review of some of the significant events is necessary to understand our disposition of these complex appeals. Plaintiff brought a complaint for injunction and declaratory judgment against defendants, City of Evanston, William Dettmer, and M. Garland. Dettmer was the city's Director of Inspections and Permits; Garland was the city's Chief Property Standards Inspector. Within the complaint plaintiff made numerous allegations which are hereinafter set forth. Plaintiff took possession of the disputed premises in Evanston under a lease on October 1, 1972; and on October 4, 1972, plaintiff and its landlord submitted an application to the Zoning Board of Appeals of Evanston (Zoning Board) for a special use permit to use the premises as a theological school. On March 20, 1973, the Zoning Board conducted a hearing and reported its findings and recommendations to the Mayor and City Council of Evanston. The Zoning Board found that the proposed special use was designed, located, and proposed to be operated for public health, safety, and welfare, as the change in the premises from its former use as a storage warehouse and the correction of building violations would be in the best interests of the community. In addition, the Zoning Board also found that the proposed special use would not cause appreciable injury to the value of other property; instead, the use would benefit surrounding properties because plaintiff would be upgrading the premises. Upon the completion of these findings, the Zoning Board then recommended to the Evanston City Council that plaintiff's application for a special use permit be granted subject to compliance with zoning ordinances, the Building Code, and all other applicable laws.

On July 30, 1973, the Evanston City Council referred plaintiff's application back to the Zoning Board for further findings of fact. The Board conducted additional hearings and again found that plaintiff's proposed special use was designed, located, and proposed to be

operated so that public health, safety, and welfare would be protected. The Board again found that the proposed use would not cause appreciable injury to the value of surrounding property. The Board again recommended that the special use permit be granted subject to the condition that all housing, electrical, plumbing. and building violations be corrected within 120 days. If the violations were not corrected within the stipulated time period, the Board then recommended that the application should be denied. On March 25, 1974, the Evanston City Council adopted ordinance 7-0-74 granting the special use permit subject to the correction of violations within 180 days.

Prior to the expiration of the 180-day period, plaintiff petitioned the City Council for additional time in which to correct violations. The City Council then enacted an ordinance granting an extension of time to February 15, 1975. Once the additional time was granted, plaintiff allegedly became obligated under a certain building contract. The subcontractors were issued permits to correct violations on November 8, 1974. On November 11, 1974, however, the Evanston City Council withdrew its ordinance granting the extension of time. In a notice dated November 13, 1974, plaintiff was notified that its permits issued by the Department of Inspection and Permits were revoked effective November 12, 1974.

Plaintiff entered into an Installment Agreement for Warranty Deed for the premises on February 20, 1975. On May 16, 1975. plaintiff then submitted a second application to the Zoning Board for a special use permit. The Board thereafter made the same basic findings it had previously and again recommended that the special use permit be granted. This time the Board recommended that the permit be subject to the conditions that the wholesaling and storage of incense on the premises and other commercial activities be eliminated; that the maximum occupancy on the premises be 46; that the owner make an annual payment in lieu of taxes if the

property should be exempted from taxation; and that the applicant submit a recordable covenant re the conditions enumerated. On December 9, 1975, the Planning and Development Committee of the Evanston City Council passed a motion requiring plaintiff to submit a written report regarding zoning ordinance requirements, the impact of the proposed use, and the number of motor vehicles owned by those occupying the premises. Plaintiff was also asked to provide a floor plan of the building. On February 15, 1976, plaintiff complied by providing both the report and the floor plans.

Nevertheless, on August 23, 1976, the Planning and Development Committee made certain findings of fact which were in sharp contrast to those by the Zoning Board. The Committee found that plaintiff had not demonstrated that the proposed use was designed, located, and proposed to be operated to protect public health, safety, and welfare because the frequent chanting at the temple disturbed neighbors, because the large number of parked cars generated by the operation created traffic congestion, and because the dilatory response in meeting code violations and answering requests for information made it unlikely that public health and safety would be adequately protected. For these reasons, the Committee also found that plaintiff had not demonstrated that the use would not cause appreciable injury to the value of surrounding property. Lastly, the Committee also found that plaintiff had not demonstrated that the use "will not subvert or defeat the primary purpose of the zoning ordinance, or the zoning district or area for which it is proposed, when its effect is considered in conjunction with the cumulative effect of the number of various special uses of all types already located in the adjacent area."

On September 13, 1976, at a meeting of the Evanston City Council, the Committee reported its recommendation and that of the Zoning Board. The Evanston City Council thereafter passed a motion denying plaintiff's second application for a special use permit. On September

28, 1976, defendant Garland, Chief Property Standards Inspector, sent plaintiff a letter ordering it to vacate the premises on or before October 31, 1976, under pain of future legal proceedings. All of these facts were set forth in plaintiff's complaint.

In their answer to the complaint, defendants admitted almost all of the background information alleged by plaintiff, but denied that any contracts were contingent or became absolute upon the extension of the 180-day time period or the issuance of permits. Defendants did allege, however, that the ordinance purportedly enacted to extend the time period for correction of code violations was itself null and void because that enactment purported to amend ordinance 7-0-74 without a public hearing as required. Although defendants admitted that certain permits were issued, they denied that plaintiff secured any rights thereunder or became obligated on certain contracts as a result. Defendants also alleged that the city withdrew the ordinance permitting the extension because the corporation counsel informed the City Council that the ordinance was null and void because it was adopted without a public hearing. In addition, defendants alleged that the provisions of the ordinance were no longer applicable because plaintiff's original special use permit had expired due to plaintiff's failure to comply with the conditions imposed. Defendants then counterclaimed for an injunction restraining plaintiff from occupying or using the premises as a theological school or in any manner violating applicable zoning ordinances or building codes. A hearing on these matters was held on November 1, 1976.

A minister and president of the Evanston Krishnas, Ron Marinelli, testified as to the nature of the religion, its usual practices and operations, a description of the premises, and the daily activities of the religion's devotees. Since September 1976, the Evanston group has been attempting to relocate, has looked at three or four places in Chicago but has not entered into any agreements. Upon cross-examination Marinelli stated that when

the group began to make payments pursuant to the purchase agreement for the premises, plaintiff did not have a special use permit. After the argument of counsel, defendants moved that plaintiff's motion for a preliminary injunction be denied. The preliminary injunction was then denied.

A substitution of attorneys was filed a week later and plaintiff made a motion to reconsider the issuance of a preliminary injunction, which motion was then granted. Another hearing was held and Marinelli again testified. Besides repeating his previous testimony, Marinelli testified concerning the purchase agreement and payments pursuant thereto. Although the building contractor, Ashland Building Company, began work on the premises, the contractor stopped working when the building permits were revoked. Marinelli also discussed certain checks he had written as payments under the purchase and building contracts and for attorney's fees.

Defendants called several city inspectors, all of whom discussed the numerous code violations which exist in plaintiff's temple. Their testimony demonstrated the number and nature of violations in regard to the building, electrical, and plumbing regulations. A series of 42 photographs were also introduced into evidence which clearly reflect the violations. Although construction permits are needed to repair many of the violations, the witnesses explained that the necessary permits cannot be issued while premises are in violation of the zoning ordinance. Lastly, all of the inspectors agreed that the disputed premises could be repaired.

Following completion of the evidence and the argument of counsel, the court denied plaintiff's motion for a preliminary injunction; the court also denied plaintiff's motion for a stay order pending appeal. Plaintiff then took this interlocutory appeal. On the same day of the court's order and plaintiff's interlocutory appeal therefrom, the court allowed plaintiff's motion for leave to file an amended complaint and for an extension of time to answer defendants' counterclaim.

In case no. 77-573, plaintiff filed its amended complaint against the City of Evanston and Frank Hoover, a City Council member. The six-count amended complaint sought an injunction, declaratory judgment, and damages. In essence, the amended complaint alleged that defendants infringed upon plaintiff's free exercise of religion by unlawfully withdrawing an extension of a special use permit and by denying the second application: that the Evanston procedures for the issuance of special use permits are violative of due process: that defendants deprived plaintiff of equal protection and due process by its actions: that the denial of the second application had no basis in fact: and that defendants wilfully and maliciously interfered with plaintiff's property rights and free exercise of religion. Defendants generally denied all allegations while reasserting all the claims and defenses offered in response to the original complaint. Plaintiff also answered defendants' counterclaim to the original complaint which had sought an injunction restraining plaintiff from using the premises. In plaintiff's answer, it denied the allegations and disputed the reasonableness of the zoning ordinance.

Defendants filed a motion for summary judgment accompanied by an affidavit of the corporation counsel and the report of proceedings from case no. 76-1500. The attorney's affidavit summarized the various pleadings and the testimony from the hearings in 76-1500. Plaintiff then filed a motion to strike the affidavit and defendants' motion for summary judgment. At the same time plaintiff filed a cross-motion for partial summary judgment on Counts I and III of the amended complaint. The court entered judgment in defendants' favor and granted their motion for summary judgment, dismissed plaintiff's amended complaint with prejudice, entered judgment for defendants on their counterclaim, and enjoined plaintiff from using or occupying the premises or, in any manner, violating the various ordinances and building codes. Plaintiff was also ordered to terminate use and occupancy of the premises within 30 days. In case no. 77-573, plaintiff appeals from that entire judgment order.

By an order dated May 5, 1977, this court consolidated the two appeals and granted plaintiff's motion for a stay of enforcement of the lower court's judgment in 77-573. During the period of the stay we have granted, however, plaintiff has been ordered not to unreasonably violate the city's Building Code, Electrical Code, or other ordinances with respect to the use of the premises.

I.

As these separate appeals involve common parties, the same property and common issues of fact and law, we consolidated the cases for oral argument and opinion. (*Nutwood Drainage & Levee District* v. *Mamer* (1956), 10 Ill. 2d 101, 104, 139 N.E.2d 247; *Buschmann* v. *Walsh* (5th Dist. 1970), 120 Ill. App. 2d 242, 244, 256 N.E.2d 882.) Our disposition of these appeals, however, is such that we need not reach all of the contentions issued.

Plaintiff secured its special use permit by ordinance 7-0-74 on March 25, 1974. Thereafter it discovered that it could not possibly correct all of the code violations existing in the premises within the 180 days allotted. By a letter dated September 18, 1974, plaintiff notified defendants as to this situation and requested additional time from the Evanston City Council. In fact, plaintiff received additional time by the enactment of an ordinance extending the time period in which to make repairs. We believe the crux of these appeals turns on the propriety of the Council's actions in withdrawing that extension.

The record reflects that the extension was withdrawn because of the legal opinion by defendant's corporation counsel. He stated that the enactment or ordinance for extension was invalid because there was no public hearing. We disagree.

The Illinois Municipal Code contained in the Illinois Revised Statutes specifically provides for the procedures in issuing special use permits. In part, section 11-13-1.1 of the Code provides that:

> "A special use shall be permitted only after a public hearing before *some commission or committee designated by the corporate authorities,* with prior notice thereof given in the manner as provided in Sections 11-13-6 and 11-13-7. A special use shall be permitted only upon evidence that such use meets standards established for such classification in the ordinances, and the *granting of permission therefor may be subject to conditions reasonably necessary to meet such standards.*" (Emphasis added.) (Ill. Rev. Stat. 1975, ch. 24, par. 11-13-1.1.)

Thus, by state statute, the issuance of a special use permit can only follow a public hearing before some commission or committee, upon evidence that the use meets the particular ordinance standards; and reasonable conditions may be placed on the issuance of the permit. We turn now to the relevant ordinance pertaining to this matter in the Municipal Code of the City of Evanston.

Section XII, C. 4 of the Evanston Zoning Ordinance states that subsequent to a public hearing, the Zoning Board shall submit its findings on applications for permits for special uses to the City Council with a report and its recommendations. The ordinance then provides in pertinent part that:

> "b. The City Council, *upon report of the Board and without further public hearing,* may approve by ordinance or may deny any application for a type one variation or a special use at a particular location or may in writing refer the application back to the Board for further consideration, specifying the reasons therefor * * *." (Emphasis added.)

In the case at bar, therefore, the city was within its rights, as expressed in the ordinance, when it referred plaintiff's application back to the Zoning Board for further consideration. When the Board again recommended issuance with the condition of the period for repairs, the City Council accepted the finding and issued the permit. The problem in the instant case arose because of the ap-

parent misunderstanding of the proper procedure necessary to *extend* the special use permit. Yet the procedure is clearly stated in section XII, C. 4 of the Evanston Zoning Ordinance:

> "c. A variation or special use permit approved by the City Council by ordinance shall not be valid after a period of one (1) year, except for planned developments as otherwise set forth in the zoning ordinance, unless during such period such variation or special use shall be established or unless any required building, development or erection permit for an approved variation or special use is obtained within this period, after which construction shall proceed to completion within a reasonable time. *Said one (1) year period may be extended* in writing for good cause by the Director of Inspections and Permits or the City Manager or his authorized representative for up to an additional one year, *if* no other zoning changes affecting the property have been made or are formally pending before the City Council or Zoning Amendment Committee: *or said period may be extended by the Council for such time as it shall determine, for good cause and without further hearing before the Board.*" (Emphasis added.)

Thus, by the explicit terms of the ordinance, the period of a special use permit may be extended by the City Council for a time it may determine. There is no need for another public hearing before the Zoning Board.

Prior to the issuance of plaintiff's special use permit, there were at least two public hearings held before the Board. Thereafter, the City Council approved the issuance of a permit by passage of ordinance 7-0-74. When plaintiff applied for an extension, it was granted by the enactment of another ordinance. A few days later the extension was withdrawn for the single, stated reason that the ordinance granting the extension was invalid because there was no public hearing held. We believe that the ordinance granting an extension was in fact perfectly

valid. Neither the state statute, nor the local ordinance required that yet another public hearing be held.

Defendants urge that the City Council had the authority to reconsider and rescind its action pursuant to the usual rules of parliamentary procedure. (*E.g.*, Ill. Rev. Stat. 1975, ch. 24, par. 3-11-20; Rule 21.1 of the Evanston City Council; *People ex rel MacMahon* v. *Davis* (1918), 284 Ill. 439, 443, 120 N.E. 326.) While we do not dispute the city's authority to reconsider its action in extending the time period for repairs, the simple answer is that the only basis in the record for such reconsideration was the need for a public hearing and that basis was incorrect.

II.

Plaintiff filed an interlocutory appeal from the denial of its request for an injunction, and at the same time in the trial court, it moved for and was granted leave to file an amended complaint. The amended complaint did not create a wholly new cause of action (*cf. Bowman* v. *County of Lake* (1963), 29 Ill. 2d 268, 272, 193 N.E.2d 833; *Wende* v. *Chicago City Ry. Co.* (1915), 271 Ill. 437, 442, 111 N.E. 275), but instead expanded the cause of action in the original complaint. Yet the amended complaint initiated a new lawsuit while the earlier one was being appealed to this court. When defendants were granted summary judgment on plaintiff's amended complaint and on their own counterclaim, plaintiff then appealed again. Thus, we are confronted with two appeals wherein plaintiff raises numerous errors pursuant to various theories, all with the apparent objective of securing a special use permit for the disputed premises.

Defendants have not filed a motion to dismiss plaintiff's interlocutory appeal. More than moot questions or mere abstract propositions are presented by the appeal (*People* v. *McCullum* (1977), 66 Ill. 2d 306, 316, 362 N.E. 2d 307; *LaSalle National Bank* v. *City of Chicago* (1954), 3 Ill. 2d 375, 379, 121 N.E.2d 486; *People ex rel. Cairo Turf Club, Inc.* v. *Taylor* (1954), 2 Ill. 2d 160, 164, 116

N.E.2d 880); and a decision could affect the rights and interests of the parties (*Wheeler* v. *Aetna Casualty & Surety Co.* (1974), 57 Ill. 2d 184, 189, 311 N.E.2d 134; *Barnard* v. *Michael* (1945), 392 Ill. 130, 133, 63 N.E.2d 858). In view of the fact that the second appeal encompasses the first, however, the interlocutory appeal is now unnecessary. (*Cf. Phillips* v. *O'Connell* (1st Dist. 1945), 326 Ill. App. 15, 22, 61 N.E.2d 59.) However, to dismiss the appeal in case no. 76-1500 would leave intact the circuit court's denial of a preliminary injunction and the inferences, if any, that could be drawn therefrom. We think that the real essue before us is whether summary judgment was properly granted in case no. 77-573. Consequently, we need not reach the question of whether the court below abused its discretion in denying plaintiff a preliminary injunction in case no. 76-1500. A reviewing court will not consider questions or contentions which are not essential to the determination of the case before it. (*Yale Development Co.* v. *Andermann* (2nd Dist. 1976), 37 Ill. App. 3d 33, 39, 344 N.E.2d 701; *Navickas* v. *Lawrence Hall, Inc.* (1st Dist. 1967), 85 Ill. App. 2d 43, 49, 228 N.E.2d 234.) However, because of our holding in case no. 77-573, we deem it in the best interest of judicial economy that the judgment of the circuit court of Cook County in case no. 76-1500 be reversed.

III.

Plaintiff contends that summary judgment was improper because evidentiary matters were weighed and appraised. Defendants, on the other hand, contend summary judgment was proper because there were no material issues of fact. In granting summary judgment for defendants, the court had to examine all of the pleadings, affidavits, exhibits, and other documents before it. Plaintiff asserts, however, that the court improperly considered an affidavit supplied by defendants' attorney, the corporation counsel of Evanston. The affidavit summarized the pleadings up to that point and paraphrased the testimony offered at the hearings in case no. 76-1500. In its

motion to strike the affidavit and on appeal, plaintiff maintains that the affidavit does not meet the requirements contained in Supreme Court Rule 191, particularly those providing that an affidavit in support of summary judgment "shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." (Ill. Rev. Stat. 1975, ch. 110A, par. 191.) Defendants argue, however, that all matters in the affidavit were within the personal knowledge of the corporation counsel.

Even if we were willing to concede that the matters alleged were within the affiant's personal knowledge, we do not believe that the corporation counsel, if sworn as a witness, could testify competently thereto. (See *Fooden* v. *Board of Governors* (1971), 48 Ill. 2d 580, 587, 272 N.E.2d 497; *Bergesen* v. *Clauss* (1958), 15 Ill. 2d 337, 340, 155 N.E.2d 20; *Joseph W. O'Brien Co.* v. *Highland Lake Construction Co.* (1st Dist. 1972), 9 Ill. App. 3d 408, 414, 292 N.E.2d 205.) The affidavit contains not only allegations as to acts and statements attributable to other persons, but also conclusions to which the affiant could not competently have testified. (*Clausen* v. *Ed Fanning Chevrolet, Inc.* (3rd Dist. 1972), 8 Ill. App. 3d 1053, 1056, 291 N.E.2d 202.) For example, the affidavit states:

> "Thus, at the time of entering into the original lease, the plaintiff knew or should have known that its proposed use was not permitted under the Zoning Ordinance of the City of Evanston.
>
> • • •
>
> The special use permit granted in March of 1974 therefore expired by its own terms because of the failure of the plaintiff to comply with the conditions which were imposed on the special use ordinance."

Conclusory statements do not meet the requirements of Supreme Court Rule 191.

Assuming that the affidavit is improper, plaintiff comments that defendants' motion for summary judgment and plaintiff's cross-motion for partial summary judgment must be decided on the weight of the pleadings and the report of proceedings in case no. 76-1500. We agree with plaintiff on the unusual nature of this case. It is the only church or theological school zoning case we have discovered which was decided on a motion for summary judgment, prior to any discovery or depositions. Nevertheless, defendants urge that summary judgment was proper because there were no material issues of fact.

In *Presto Manufacturing Co., Inc.* v. *Formental Engineering Co.* (1st Dist. 1977), 46 Ill. App. 3d 7, 10-11, 360 N.E.2d 510, we recently set forth the principles by which to review the propriety of such a motion:

> "A motion for summary judgment is proper where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, show that there is no genuine issue as to any material fact. (Ill. Rev. Stat. 1975, ch. 110, par. 57; *Carruthers* v. *B. C. Christopher & Co.* (1974), 57 Ill. 2d 376, 380, 313 N.E.2d 457; *Barnes* v. *Washington* (1973), 56 Ill. 2d 22, 26, 305 N.E.2d 535.) Yet the reviewing court will reverse an order granting summary judgment if it determines that a material question of fact does exist (*Econo Lease, Inc.* v. *Noffsinger* (1976), 63 Ill. 2d 390, 393, 349 N.E.2d 1) because summary judgment is inappropriate under such circumstances (*20 East Cedar Condominium Association* v. *Luster* (1st Dist. 1976), 39 Ill. App. 3d 532, 534, 349 N.E.2d 586). The right of the moving party must be clear and free from doubt. (*Lesser* v. *Village of Mundelein* (2nd Dist. 1975), 36 Ill. App. 3d 433, 437, 344 N.E.2d 29; *National Bank* v. *S. N. H., Inc.* (1st Dist. 1975), 32 Ill. App. 3d 110, 117, 336 N.E.2d 115; *Wegener* v. *Anna* (5th Dist. 1973), 11 Ill. App. 3d 316, 320, 296 N.E.2d 589.) In making its determination, a court must construe the pleadings strictly against the moving party and liberally

in favor of the opponent (*Donart* v. *Board of Governors* (4th Dist. 1976), 39 Ill. App. 3d 484, 486, 349 N.E.2d 486; *Hernandez* v. *Trimarc Corp.* (1st Dist. 1976), 38 Ill. App. 3d 1004, 1006, 350 N.E.2d 202; *Cronin* v. *Delta Air Lines, Inc.* (1st Dist. 1974), 19 Ill. App. 3d 1073, 1076, 313 N.E.2d 245); and if the facts admit of more than one conclusion or inference, including one unfavorable to the moving party, the motion for summary judgment should be denied (*Dakovitz* v. *Arrow Road Construction Co.* (2nd Dist. 1975), 26 Ill. App. 3d 56, 60-61, 324 N.E.2d 444).

Although summary judgment is an important tool in the administration of justice and its use encouraged in proper cases (*Fooden* v. *Board of Governors* (1971), 48 Ill. 2d 580, 586, 272 N.E.2d 497; *Allen* v. *Meyer* (1958), 14 Ill. 2d 284, 292, 152 N.E.2d 576), courts must remain cautious not to preempt the right to trial by jury where a material dispute may exist (*Anderson* v. *Dorick* (3rd Dist. 1975), 28 Ill. App. 3d 225, 227, 327 N.E.2d 541). When faced with a disagreement as to material facts, the court must deny the motion and set the cause for trial. (*Reith* v. *General Telephone Co.* (5th Dist. 1974), 22 Ill. App. 3d 337, 339, 317 N.E.2d 369.)"

Applying these rules to the case at bar, we believe the court below prematurely and incorrectly granted summary judgment to defendants.

To have granted summary judgment in this case, the court must have impermissibly drawn inferences from undisputed facts even though a reasonable person could have drawn different conclusions from the same facts. (*Century Display Manufacturing Corp.* v. *D. R. Wager Construction Co., Inc.* (1st Dist. 1977), 46 Ill. App. 3d 643, 648, 360 N.E.2d 1346; *Toman* v. *Svoboda* (1st Dist. 1972), 4 Ill. App. 3d 148, 151, 280 N.E.2d 499.) The fact that the Assessor raised the assessed valuation of the property could indicate plaintiff's improvements to the property. The fact that the premises are not yet in full compliance with all applicable codes does not necessarily

mean that plaintiff has made no substantial effort to secure building permits or correct code violations. Since the Zoning Board recommended on three separate occasions that plaintiff be issued a special use permit, a reasonable person could well conclude that plaintiff had made a substantial effort. Furthermore, the testimony offered in case no. 76-1500 concerning code violations was the result of an inspection a few days prior to the hearing. Defendants offered no testimony or evidence concerning the building's state in March 1973, November 1973, or October 1975, when the Zoning Board made findings favorable to plaintiff. Moreover, no evidence was offered as to the building's state in September 1976, when the city denied plaintiff's second application. The evidence or lack thereof leaves defendants' right to summary judgment far from clear and hardly free from doubt.

Defedants maintain that this is a simple zoning case wherein the city exercised its well known police powers to regulate property for the protection of public health, safety, morals, and welfare. We are troubled, however, by the municipality's inconsistent position. If the city had not issued a special use permit originally, and if it had not thereafter extended the period for repairs, we might agree that this is a simple zoning case. Yet the city did issue the permit and did provide the extension; and we cannot ignore that the Zoning Board consistently made favorable findings. All of these are also facts. They, too, admit of more than one conclusion or inference, including one unfavorable to the moving party. Although defendants argue that plaintiff's failure to show compliance with the conditions imposed on the permit is fatal to its case, we are unpersuaded because of the unique facts before us.

Our disposition of this case should not be interpreted as a departure from the line of cases holding that religious institutions are subject to reasonable municipal regulation. (See, for example, *South Side Move of God Church* v. *Zoning Board of Appeals* (1st Dist. 1977), 47 Ill. App.

3d 723, 365 N.E.2d 118; *Coston Chapel A.M.E. Church* v. *Chaddick*, (1st Dist. 1972), 9 Ill. App. 3d 321, 292 N.E. 2d 215; *St. James Temple* v. *Board of Appeals* (1st Dist. 1968), 100 Ill. App. 2d 302, 241 N.E.2d 525.) In our opinion, however, it would be hasty and premature to apply the rulings gleaned from those cases to the instant one. Although plaintiff has tried to secure a permit for five years, the record before us reflects a case still in its earliest stages.

Plaintiff should be given the opportunity to establish, if it can, that it is entitled to an injunction, declaratory judgment, and damages. Therefore, we think it inappropriate to comment on the merits of plaintiff's case. Due to the position we have taken in part I of this opinion, we find it unnecessary to discuss the other issues plaintiff has raised, particularly those in connection with its second application for a special use permit. Those questions are of a constitutional dimension; and it is well settled that when a case may be disposed of on other grounds, constitutional questions will not be considered. *Stigler* v. *City of Chicago* (1971), 48 Ill. 2d 20, 22, 268 N.E.2d 26; *People ex rel. Downs* v. *Scully* (1951), 408 Ill. 556, 563, 97 N.E.2d 829; *Winston* v. *Zoning Board of Appeals* (1950), 407 Ill. 588, 592, 95 N.E.2d 864.

IV.

In accordance with the views expressed in this opinion, summary judgment was wholly inappropriate. We, therefore, reverse the judgment of the circuit court of Cook County and remand case no. 77-573 with instructions to conduct further proceedings consistent with this opinion. We also reverse the judgment of the circuit court of Cook County in case no. 76-1500 and suggest to that court that as such issues are now moot, the said cause be dismissed.

Case no. 77-573 reversed and remanded with directions.

Case no. 76-1500 reversed with directions.

STAMOS and PERLIN, *JJ., concur.*

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

No. 76 CH 6336

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., an Illinois not-for-profit corporation,

Plaintiff,

vs.

CITY OF EVANSTON, a municipal corporation,

Defendant.

TRIAL JUDGE'S MEMORANDUM OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed August 21, 1978)

NATURE OF THE CASE

The plaintiff, International Society for Krishna Consciousness, Inc., is a not-for-profit corporation organized under the laws of Illinois as a religious organization.[1]

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[1] During the trial the plaintiff introduced substantial evidence to establish that the International Society for Krishna Consciousness qualifies as an authentic religion so that it comes within the purview of that provision of the defendant's ordinance relating to religious usage of a premise. The question, however, never developed as an issue in the case. Parenthetically, it is indisputable that the Krishna followers constitute a Hindu religion and that Krishna is one of the most widely revered and most popular of all Indian divinities, worshipped as the 8th incarnation of the Hindu god Visnu and also as a supreme god in his own right. Its scriptures are written in Sanskrit, which is the oldest recorded form of Indo-European speech and the most important religious and literary language in India. In India there are in excess of 40 million Hindu followers. (Encyclopedia Britannica (1974), Micropedia, Vol. 5, pg. 922; *The Ecumene, Story*

The building had been used for a number of years as a YMCA premises. It contained a swimming pool and apparently other appropriate facilities. The building was then converted and used as a general warehouse for several years.

In October, 1972, the plaintiff took possession of the premises as a lessee. The building is located in a C-2 district under the defendant's zoning ordinance. A C-2 classification is one of the commercial zoning districts which permits a number of commercial uses. Theological use of the premises, however, is prohibited in a C-2 classification without a special use permit.

In October, 1972, the plaintiff and its landlord submitted an application to the Zoning Board of Appeals for the City of Evanston for a special use permit to allow the use of the premises for theological purposes. The Zoning Board conducted an investigation and had a hearing on March 20, 1973, concerning the plaintiff's application. Subsequently, the Zoning Board made favorable findings and recommended to the Evanston City Council that the plaintiff's application for a special use permit should be granted subject to compliance with the various applicable building ordinances and Codes.

On July 30, 1973, the Evanston City Council returned plaintiff's application to the Zoning Board for further findings of fact. The Zoning Board conducted additional hearings and made favorable findings and again recommended that the plaintiff's special use permit be granted subject to the condition that all building violations[2] be corrected within 120 days.

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[1] (Continued)
of Humanity, by William H. McNeill, Professor of History at the University of Chicago, Harper & Row (1973), pages 442, 443, 494, 495; The Random House Dictionary of the English Language, Unabridged Edition (1967), at page 1267.)

[2] The term, "building violations", shall be taken herein to include all housing, electrical, plumbing, Code and general building violations.

As a result, on March 25, 1974, the Evanston City Council adopted ordinance 7-0-74 granting a special use permit to the plaintiff subject to the correction of building violations within 180 days.

On September 18, 1974, prior to the expiration of the 180 day period, the plaintiff petitioned the City Council for additional time in which to correct the building violations. Accordingly, on November 4, 1974, the City Council enacted an ordinance granting an extension of time to February 15, 1975.

The plaintiff then entered into a contract with the Ashland Building Company, general contractors, to correct the building violations. On November 8, 1974, permits were issued by the Department of Inspection and Permits to the Ashland Building Company to correct the violations that existed in the building.

On November 11, 1974, however, the Evanston City Council withdrew its ordinance granting the 180 day extension of time to February 15, 1975. The plaintiff was notified that the permits issued by the Department of Inspection and Permits were revoked effective November 12, 1974.

On February 20, 1975, the plaintiff entered into an installment agreement for the purchase of the building. On May 16, 1975, the plaintiff submitted a second application to the Zoning Board of Appeals for a special use permit. On September 16, 1975 and October 21, 1975, the Zoning Board conducted hearings on the plaintiff's second application for a special use permit, and again made favorable findings and recommended issuing a special use permit.

On September 13, 1976, however, the City Council denied the plaintiff's second application for a special use permit. On September 28, 1976, the defendant caused a letter to be sent to the plaintiff ordering it to vacate the premises on or before October 31, 1976. The plaintiff, however, has continued to occupy and use the premises.

In previous proceedings in this case, i.e., before the trial on the merits, the defendant took the position that the ordinance it enacted to extend the time period for correction of the building violations was itself null and void because that enactment purported to amend ordinance 7-0-74 without a public hearing. The defendant claimed that a public hearing was required pursuant to the Evanston Zoning Ordinance, and no public hearing for the extension was in fact held. In addition, the defendant took the position that the provision of the ordinance extending the time period to make the corrections was no longer applicable because plaintiff's original special use permit had expired due to the plaintiff's failure to comply with the conditions imposed. Accordingly, the defendant counterclaimed for an injunction restraining the plaintiff from occupying or using the premises as a theological school or in any manner violating applicable zoning ordinances or building codes.

The plaintiff filed a motion for a preliminary injunction. After a hearing, the motion was denied by Judge Raymond K. Berg. The plaintiff filed an interlocutory appeal. In the interim the plaintiff filed an amended complaint. The defendant filed a motion for summary judgment. After a hearing, Judge Berg entered a summary judgment in defendant's favor, dismissed plaintiff's amended complaint with prejudice, entered judgment for the defendant on its counterclaim, and enjoined the plaintiff from using or occupying the premises or, in any manner, violating various ordinances and building codes. The plaintiff was also ordered to terminate use and occupancy of the premises within 30 days. The plaintiff appealed from the entire judgment.

The appellate court consolidated the plaintiff's interlocutory appeal and the appeal from the final judgment. The appellate court opinion as modified on rehearing was filed on November 1, 1977, and is reported at 53 Ill. App. 3d 443.

The appellate court disagreed with the defendant's contention that the defendant's extension of time to the plaintiff to correct the building violations was invalid because no public hearing was had on the request for the extension of time. The appellate court stated that by explicit terms of the defendant's ordinance the period of a special use permit may be extended by the City Council for a time that it may determine and there is no need for another public hearing before the Zoning Board of Appeals. The appellate court, therefore, held that the ordinance granting the plaintiff an extension of time was in fact "perfectly valid". The appellate court also reversed Judge Berg's order denying the plaintiff's motion for an injunction. The case then, after certain other motions were filed, was assigned to this court and a trial was had on all issues.

The Second Amended Complaint

The case proceeded to trial on a seven count second amended complaint which seeks an injunction, declaratory judgment, compensatory and punitive damages, and attorneys' fees and costs.

Counts I and II allege that the defendant sought to proscribe the plaintiff's religious activities in violation of the 14th Amendment of the United States Constitution and Article I, Section 3 of the Illinois Constitution. Count I relates to the actions of the City Council of Evanston on November 11, 1974, when it withdrew the 180 day extension pursuant to the ordinance it issued on November 4, 1974. Count II relates to the action of the City Council of Evanston when it denied the plaintiff's second application for a special use permit on September 13, 1976. Count III alleges that the defendant's zoning ordinance governing the issuance of special use permits is unconstitutional on its face because it constitutes a deprivation of due process of law as secured by the 5th and 14th Amendments of the United States Constitution and Article I, Section II of the Illinois Constitution. Count IV alleges that the action of the City Council of

Evanston in denying the plaintiff's second application for a special use permit deprived the plaintiff of equal protection and due process of law as secured by the 5th Amendment and the 14th Amendment of the United States Constitution and Article I, Section II of the Illinois Constitution. Count V alleges that the defendant's denial of the plaintiff's second application for a special use permit was without any basis in fact. Counts VI and VII allege separate actions at law for damages. Count VI seeks compensatory and punitive damages for willful malicious interference with the plaintiff's property rights and business affairs. Count VII seeks compensatory and punitive damages for willful and malicious interference with the plaintiff's free exercise of religion as secured by the 1st and 14th Amendments of the United States Constitution and Article I, Section III of the Illinois Constitution.

Although not artfully expressed, the second amended complaint also alleges in the various counts that the defendant was a party to a conspiracy to interfere with the civil rights of the plaintiff by depriving it of its constitutional rights and privileges.

The plaintiff's suit is based mainly on what is commonly referred to as the Civil Rights Act. (42 U.S.C., § 1981, et seq.) Section 1931 deals with the equal rights of all persons under the law; Section 1983 provides a civil action for deprivation of one's constitutional rights and privileges; Section 1985 provides for the recovery of damages against any one or more conspirators who conspired to deprive a person of his constitutional rights and privileges; Section 1988 is *inter alia*, "The Civil Rights Attorney's Fees Awards Act of 1976" (see Public Law 94-599, Oct. 19, 1976, 90 Stat. 2641).

FINDINGS AND CONCLUSIONS

The fact that serves as a beacon in this case is the totally unexplained inconsistent positions taken by the defendant relating to the issuance of a special use permit

to the plaintiff. On the one hand, the defendant issued a special use permit to the plaintiff on March 25, 1974, and there is no evidence that the defendant made a mistake or acted improperly at that time. On the other hand, the defendant now claims that it should not issue a special use permit to the plaintiff although there is no evidence that there has been any substantial change in the condition of the premises or its environs. Absent some explanation by the defendant as to what went awry between March 25, 1974, and the present, the defendant's conclusion are irreconcilable.

In the trial defendant introduced expert testimony to the effect that the highest and best use of the property would not be consistent with the use proposed by the plaintiff, and that the proposed use would be detrimental to the neighborhood. The reasons given by the expert, however, were not very convincing in light of all the circumstances involved in the case. The defendant also introduced evidence that the property has building violations, but these generally appear to be the same building violations that existed in 1973 and 1974 when the Zoning Board on more than one occasion, after conducting its own investigation, recommended that the special use permit be issued and the City Council issued the special use permit and even extended its effectiveness by a special ordinance. Further. the evidence is unequivocal that *all* the building violations were repairable and correctable when the special use permit was originally issued on March 25, 1974, and that they are presently repairable and correctable. The defendant's own evidence establishes this latter fact.

In the trial the defendant also introduced testimony that the proposed use of the premises for religious purposes will increase the congested parking and traffic conditions. Coincidentally, another religious institution, the Eboneezer African Methodist Episcopal Church, is located across the street and just a short distance west of the plaintiff's premises. It is obvious that churches in any

location will add to parking and traffic congestion during hours of worship. There is no evidence, however, to show that in this case there is any danger of a traffic or parking problem that would justify a use of the police power to restrict the plaintiff's fundamental right of freedom of worship. It is this court's conclusion, therefore, that the denial of the plaintiff's right of worship at this location, upon the speculative fears of parking and traffic congestion, bears no reasonable relation to the general health, safety, morals or welfare of the defendant. (See, *Columbus Park Congregation of Jehovah's Witnesses* v. *Board of Appeals,* 25 Ill. 2d 65, 73 (1962).)

During the trial the defendant took the position that a special use permit should not be issued because the building violations have not as yet been corrected. This contention is clearly untenable.

The evidence establishes that before a contractor can correct the building violations it must receive permits from the Department of Inspection and Permits. The Department of Inspection and Permits, however, will not issue any permits to make the corrections because the plaintiff does not have a special use permit, and the defendant effectively rescinded the plaintiff's special use permit when it revoked the extension of time to make the corrections. Thus, the plaintiff finds itself in a "Catch-22" situation. It cannot, theoretically, be issued a special use permit because of the building violations, and it cannot correct the building violations because it does not have a special use permit. It is hard to imagine a more ridiculous postulation. It is tantamount to giving the plaintiff the "option" of having to fit a round peg into a square hole or a square peg into a round hole.

In addition, since the Zoning Board had recommended on separate occasions that the plaintiff be issued a special use permit, and the time for correcting the building violations had been extended by the defendant on separate occasions, a reasonable person would conclude, absent

other evidence, that the plaintiff had been making a substantial effort to make the corrections before the extension was improperly revoked[3] only a few days after it had been issued.

Of course, the defendant had the authority to reconsider its action in extending the time period to make the building corrections, but it could not have properly done so if the effect of its decision was to deny the plaintiff a special use permit arbitrarily and capriciously and without due process of law. (Cf., *Columbus Park Congregation of Jehovah's Witnesses* v. *Board of Appeals*, 25 Ill. 2d 65, 73 (1962); *Village of La Grange* v. *Leitch*, 377 Ill. 99, 102 (1941).) Since the *only* basis in the entire record of this case, including the trial, for such reconsideration by the defendant was the alleged need for a prior public hearing on the question—*and that basis has been determined by the appellate court to be incorrect*[4]—the only reasonable conclusion to be reached is that the defendant's revocation of the extension of time without affording the plaintiff an opportunity to disprove the action was arbitrary and capricious and without procedural due process of law to the person affected thereby.

I agree with the defendant that zoning is primarily a legislative function, the legality of a special use ordinance is well settled, the burden is on the plaintiff to satisfy the standard a special use ordinance imposes, the location of churches and religious institutions can be regulated by zoning ordinances, and that the decision of a zoning authority is ordinarily subject to judicial review only for the purpose of determining if it constitutes an undue invasion

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[3] See appellate court opinion, 53 Ill. App. 3d 443, 453 (1977).

[4] When the issue came up on appeal, the appellate court held (53 Ill. App. 3d 443, 453): "We believe that the ordinance granting an extension was in fact perfectly valid. Neither the State statute, nor the local ordinance required that yet another public hearing be held."

of private rights without a reasonable relation to the public health, morals, safety and welfare.[5] (*Columbus Park Congregation of Jehovah's Witnesses* v. *Board of Appeals,* 25 Ill. 2d 65, 70, 71 (1962); *St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, 309 (1968).)

Every owner, however, has a right to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare. Zoning laws, which limit that right, are enacted pursuant to the police power of the State, and when that power is delegated to a municipality to permit it to interfere with property rights by means of zoning ordinances, such ordinances, to be valid must have a real and substantial relation to the public health, safety, morals or general welfare. (*Columbus Park Congregation of Jehovah's Witnesses* v. *Board of Appeals,* 25 Ill. 2d 65, 70, 71 (1962); *Village of La Grange* v. *Leitch,* 377 Ill. 99, 102 (1941)).

Based upon all of the evidence in this case I find that the defendant's revocation of the extension of time to the plaintiff to correct the building violations, without affording the plaintiff an opportunity to confute the defendant's action, was arbitrary and capricious and without procedural due process of law to the person affected thereby. The defendant's action, which effectively rescinded the special use permit to the plaintiff, bears no

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[5] I feel constrained, however, to note that first amendment freedoms rise above mere property rights and that they rise far above public inconvenience, annoyance or unrest. (*Terminiello* v. *City of Chicago,* 337 U.S. 1, 4, 93 L.Ed. 1131, 1134, 69 S. Ct. 894, 896, (1949); *Columbus Park Congregation* v. *Board of Appeals,* 25 Ill. 2d 65, 71 (1962).) I also strongly doubt that legislation regulating first amendment freedoms has the normal strong presumption of validity. (See. *Thomas* v. *Collins,* 323 U.S. 516, 529, 530, 87 L.Ed. 430, 439, 65 S.Ct. 315, 322, (1945); *U.S.* v. *Carolene Products,* 304 U.S. 144, 152 (see footnote), 82 L.Ed. 1234, 1241, 58 S.Ct. 778, 783 (1938); *Columbus Park Congregation* v. *Board of Appeals,* 25 Ill. 2d 65, 71 (1962).)

real and substantial relation to the public health, safety, morals or welfare. The defendant's revocation of the extension of time to the plaintiff to correct the building violations, therefore, violated the plaintiff's right to procedural due process of law, in violation of the 14th Amendment of the Constitution of the United States.[6]

Accordingly, an order shall be entered commanding the defendant to issue a special use permit to the plaintiff reasonably conforming to the special use permit that was issued to the plaintiff on March 25, 1974, with a reasonable allowance for sufficient time to correct and repair all existing building violations and whatever other violations presently exist with respect to the subject property. Also, an order shall be entered enjoining the defendant from doing any act or taking any action inconsistent with the

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[6] A discussion of what is meant by procedural due process and its application to the 14th Amendment can be found in *Carey* v. *Piphus*, ... U.S. ....., ..., 55 L.Ed. 2d 252, 262, 98 S. Ct. 1042, 1050 (1978): "The Due Process Clause of the Fourteenth Amendment provides:

> 'nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .' This Clause 'raises no impenetrable barrier to the taking of a person's possessions,' or liberty, or life. *Fuentes* v. *Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . .' Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed. 2d 18 (1976). Such rules 'minimize substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to contest the basis upon which the State proposes to deprive them of protected interest. Fuentes v. Shevin, supra, 407 U.S., at 81, 92 S.Ct., at 1944."

findings, conclusions and directions of this court as stated in this memorandum. The defendant's counterclaim for an injunction shall be denied.

I further find that the evidence does not establish that the defendant violated any of the plaintiff's constitutional rights under the federal or Illinois constitutions as alleged in any of the counts in the second amended complaint, except as expressly stated in this memorandum or any order or judgment entered pursuant to or as a result of this memorandum.

Damages

Counts 6 and 7 of the second amended complaint allege separate actions at law for damages. Count 6 seeks compensatory and punitive damages for willful and malicious interference with the plaintiff's property rights and business affairs.

The evidence does not establish that there was a willful or malicious interference with the plaintiff's property rights and business affairs. Consequently, I find that the plaintiff is not entitled to compensatory or punitive damages under Count 6 of the second amended complaint. Count 7 seeks compensatory and punitive damages for willful and malicious interference with the plaintiff's free exercise of religion as secured by the 1st and 14th Amendments of the United States Constitution and Article I, Section III of the Illinois Constitution. The evidence does not establish that there was a willful or malicious interference with any of the plaintiff's constitutional rights, privileges or guarantees. For this reason, I find that the plaintiff is not entitled to compensatory or punitive damages for any alleged willful or malicious interference with any of the plaintiff's constitutional rights. Although I find that the plaintiff's constitutional rights as to procedural due process have been violated, *supra*, I do not find that the defendant acted willfully or maliciously.

The next question concerning damages is whether the plaintiff is entitled to recover damages pursuant to Section 1983 of the Civil Rights Act. (42 U.S.C. Section 1983). In *Monroe* v. *Pape,* 365 U.S. 167, S.Ct., 473, 5 L.Ed. 2d 492, (1961), the United States Supreme Court held that municipal bodies (such as the defendant, City of Evanston), were not within the class of "persons" subject to a claim for damages under the Civil Rights Act, and, therefore, no civil action for damages could be brought against a municipality. Recently, however, in *Monell* v. *Department of Social Services,* 429 U.S. 1071, 98 S.Ct. 2018, 50 L.Ed. 2d 789, (1978), the United States Supreme Court overruled itself and held that municipal bodies are "persons" within the Civil Rights Act and that, therefore, a civil action for damages under the Civil Rights Act could be maintained against a municipal body. Thus, this suit is properly brought against the defendant, City of Evanston, for damages pursuant to the Civil Rights Act.

I have found, however, only two zoning cases which involve claims for damages under the Civil Rights Act: *Shellbourne* v. *Newcastle County,* 295 F.Supp., 237 D.C., Delaware (1968), and *Shannon Fredericksburg Motor Inn, Inc.,* v. *Hicks,* 434 F. Supp., 803, D.C., Virginia (1977). In *Shellbourne* v. *Newcastle County* the court relied upon *Monroe* v. *Pape, supra,* and held that the defendant municipal corporation was immune from liability under the Civil Rights Act. In *Shannon Fredericksburg Motor Inn, Inc.,* v. *Hicks,* the court also relied upon *Monroe* v. *Pape* and ruled that a county board member who voted on a certain zoning ordinance was immune from liability under the Civil Rights Act. Both cases are, therefore, of little value since the *Monroe* v. *Pape, supra,* case was subsequently overruled by the Supreme Court in *Monell* v. *Department of Social Services, supra.*

Although there does not appear to be any zoning case precedent dealing with the question of damages under the Civil Rights Act, the question of the type of damages that are recoverable for a deprivation of procedural due process was recently before the United States Supreme Court

in *Carey* v. *Piphus*, ... U.S. ....., 55 L.Ed. 2d 252, 98 S.Ct. 1042 (1978). I believe that case is apposite.

In *Carey* v. *Piphus, supra,* the Supreme Court held that neither injury nor damages are presumed from a violation of procedural due process, and that damages are not awarded to a plaintiff to serve as a deterrent to the defendant's action. The court also held that in the absence of proof of actual injury and damages a plaintiff is entitled to recover only nominal damages for a deprivation of procedural due process. (*Infra.*)

In *Carey* v. *Piphus, supra,* the court stated and held (..... U.S. ....., ..., 55 L.Ed. 2d 252, 255, 259, 260, 98 S.Ct. 1042, 1044):

> "The Court of Appeals for the Seventh Circuit held that the students are entitled to recover substantial nonpunitive damages * * * even if they do not prove that any other actual injury was caused by the denial of procedural due process. *We disagree, and hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.*"
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> "The lower federal courts appear generally to agree that damages awards under §1983 should be determined by the compensation principle."
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> "*To the extent that Congress intended that awards under §1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.*" (Emphasis supplied.)

Continuing with what the court stated and held in *Carey* v. *Piphus, supra,* (..... U.S. ....., ..., 55 L.Ed. 2d 252, 266, 98 S.Ct. 1042, 1054):

> "Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award

of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."

"Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see Boddie v. Connecticut, 401 U.S. 371. 375, 91 S.Ct. 780, 784, 28 L.Ed. 2d 113 (1971); Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-172, 71 S.Ct. 624, 648-649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners."

It follows, in the present case, that absent proof of actual injury and damages, the plaintiff is entitled to recover only nominal damages.

The plaintiff has been occupying and using the premises, albeit without the color of a special use permit, for its intended purpose, including the conducting of religious services and habitation, since the special use permit in question was issued in 1974.

The plaintiff apparently believes, however, that it is injured and damaged to the extent that there may be a difference between what it would cost today and what it would have cost in 1974 to correct the building violations. There is not sufficient evidence in this trial record, how-

ever, to corrolate the specific building violations that existed in 1974 with the present specific building violations and there is not sufficient probative evidence as to how much more it would cost today to make those specific repairs and corrections. Presumably, if there was such evidence to establish these facts, some consideration would then have to be given to the fact that since 1974 the plaintiff had the use, benefit, and income of the difference in the amount that it would cost to make repairs and corrections.

In passing upon this point, I referred to the testimony of one of the plaintiff's witnesses who testified in general terms that it would cost more today than in 1974 to make repairs to the building. His testimony, however, was not specific enough to have any meaningful probative value and his testimony does not corrolate the building violations that existed in 1974 with those that exist today so that a comparison of the existence of the building violations and the difference in the cost of the repairs could be made.

It was the plaintiff's burden to prove every material element in its case by competent evidence and with reasonable certainty, *including any alleged damages.* (Looby v. Buck, 20 Ill. App. 2d 156, 162 (1959).) Although absolute certainty as to the amount of damages is not ordinarily required to justify a recovery, in the present case, the evidence simply is not sufficient to form a reasonable inference or basis for the assessment of damages with any fair or reasonable degree of certainty. There is not sufficient evidence to even reasonably approximate the alleged extent of any damages to the plaintiff even if I were to assume the plaintiff was damaged.

Of course, the law does not require better evidence than can reasonably be obtained to prove damages, but in the present case the purported difference that it would cost between 1974 and the present to repair the specific building violations that exist is obviously susceptible to proof by direct and positive evidence. When alleged compensatory damages are susceptible to proof with approximate ac-

curacy and may be measured with some degree of certainty, there must be reasonable sufficient evidence to establish such facts in order to assess damages against a defendant. In such cases, alleged damages which are predicated upon speculation, hypothesis, or mere conjecture cannot be made the basis of a recovery against a defendant. (Looby v. Buck, 20 Ill. App. 2d 156, 162 (1959); I.L.P. Damages, Pages 372, 375, 529, 549; the case of De Koven Drug Co. v. First Nat'l. Bank, 27 Ill. App. 3d 798 (1975) is distinguished from the present case, because, *inter alia*, in the present case the plaintiff has not established even a reasonable inference of damages with any fair degree of probability.)

In view of the foregoing, I find and conclude that the evidence does not establish that the plaintiff has proven compensatory damages under the Civil Rights Act.

Since the right to procedural due process is inviolate, even though actual compensatory damages were not proven, the plaintiff is entitled to recover nominal damages from the defendant, in the amount of one dollar. It is hoped that the defendant will not take the assessment of only nominal damages lightly and that it will hereafter mete procedural due process to *all* its citizenry.

Attorneys' Fees and Costs

The second amended complaint seeks attorneys' fees and costs. Apparently, it is the plaintiff's theory that it is entitled to attorneys' fees and costs as part of its alleged damages pursuant to some common law principle of recovery or that it is entitled to attorneys' fees pursuant to Section 1988 of the Civil Rights Act.

It is the general rule in the U.S. that in the absence of legislation providing otherwise, litigants must pay their own attorneys' fees. (*Alyeska Pipeline* v. *Wilderness Society*, 421 U.S. 240, 247, 44 L.Ed. 2d 141, 147, 95 S.C. 1612, 1616 (1975); *Christiansburg Garment* v. *EEOC*, 434, U.S. 412, ..., 54 L.Ed. 2d 648, 653, 98 S.C. 694, 697 (1978).)

In *Alyeska Pipeline* v. *Wilderness Society, supra,* the circuit court of appeals awarded attorneys' fees to the prevailing party, based in part upon the court's equitable powers. Certiorari was granted, and the circuit court of appeals was reversed. The Supreme Court stated and held (421 U.S. 240, 247, 249, 270, 44 L.Ed. 2d 141, 147, 149, 160, 95 S. Ct. 1612, 1616, 1618, 1628):

> "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule' but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.
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> "In 1796, this Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts. In Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 1 L.Ed. 613, the inclusion of attorneys' fees as damages was overturned on the ground that '[t]he general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.' This Court has consistently adhered to that early holding."
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> "We do not purport to assess the merits or demerits of the 'American Rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts

with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

The Supreme Court in the above case recognized that there are exceptions to the general rule that the prevailing party is ordinarily not entitled to collect attorneys' fees from the loser, e.g., bad faith may justify an allowance of attorneys' fees to the prevailing party. The exceptions to the general rule are more fully discussed in *Hutto* v. *Finney*, 46 L.W. 4817 (1978), at page 4820, Note 14.

The bad faith exception which may form the basis for an award of attorneys' fees may be in the conduct which necessitated the action or in conduct occurring during the course of the action. (*Hall* v. *Cole*, 412 U.S. 1, 36 L.Ed. 2d 702, 93 S.C. 1943, 1951 (1973).) In the present case, however, I find that there is not sufficient evidence to establish bad faith in the action that led to the law suit or in the conduct of the litigation. Consequently, this exception to the general rule is not availing to the plaintiff in this case.

The law in Illinois with respect to the allowance of attorneys' fees to the prevailing party is aptly stated in *House of Vision* v. *Hiyane*, 42 Ill. 2d 45, 51 (1969):

"Defendants next raise the issue, long settled by this court to the contrary (but now clothed in due process terms) that the eventual successful litigant should receive indemnification of all attorneys' fees and actual expenses reasonably incurred in enforcing his rights. They recognize that in this country, contrary to the English system, the idea has had scant acceptance. Apparently to avoid the view that this is a legislative matter, they suggest that this court has the power to make the change through its rule-making power. The constitutional argument seems to be that Illinois 'and the rest of the States' tend to discourage

> persons from seeking vindication because they cannot be made whole. This and similar arguments have often been made without avail. (See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 18 L. Ed. 2d 475, 87 S.Ct. 1404) Our oft-stated view is that, in the absence of statute (with exceptions not here germane), attorneys' fees and the ordinary expenses and burdens of litigation are not allowable to the successful party. (Scherzer v. Keller, 321 Ill. 324; Patterson v. Northern Trust Co., 286 Ill. 564; Ritter v. Ritter, 381 Ill. 549). It is unnecessary to comment upon our rule-making power since we are not disposed to change a doctrine so ingrained in our system of jurisprudence."

Clearly, the plaintiff's contention regarding the allowance of attorneys' fees as part of its alleged damages is totally untenable, absent an applicable statutory provision. (See, also: Qazi v. Ismail, 50 Ill. App. 3d 271, 272, 273, (1977).)

Section 1988 of the Civil Rights Act provides: "The court, in its discretion, may allow the prevailing party, • • •, a reasonable attorney's fee as part of the costs." It can now be taken as established that this provision of the Civil Rights Act means: "A prevailing plaintiff ordinarily is to be awarded attorneys' fees in all but special circumstances." (See, *Christiansburg Garment* v. *EEOC*, ... U.S. ....., ..., 54 L.Ed. 2d, 648, 653, 98 S.C. 694, 697 (1978); *Alyeska Pipeline* v. *Wilderness Society*, 421 U.S. 240, 247, 44 L.Ed. Section 141, 147, 95 S.C. 1612, 1624 (1974); *Chastang* v. *Flynn*, 541 F. 2d 1040, 1045, 4th Circuit, Maryland (1976).)

In the present case the constitutional violation involves *solely* procedural due process. There is absolutely no evidence that it involves the invidious characteristics of racial, religious, ethnic, employment or sex discrimination; nor is there sufficient evidence to establish bad faith or malice or willful and hateful discriminatory conduct; nor is there a pattern or *modus operandi* abridging consitutional rights.

This is not to suggest that procedural due process is any less important or significant than other constitutional guarantees. I believe, however, that one of the factors to consider with respect to whether special circumstances exists is the nature of the interests protected by the particular constitutional right in question. (See and compare what the U.S. Supreme Court said relating to damages for the violation of varying constitutional rights, in *Carey* v. *Piphus.*[7])

While the defendant violated the plaintiff's right to procedural due process, it should be kept in mind that zoning is primarily a legislative function, the special use technique utilized in the defendant's zoning ordinance is a permissable zoning procedure, and that the location of churches and religious institutions can be regulated by zoning ordinances and special use provisions in ordinances. (*St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, 309, 313 (1968); *Columbus Park Congregation* v. *The Board of Appeals,* 25 Ill. 2d 65, 70, 71 (1962). Thus, the defendant's action was within the ambit of its proper legislative function, albeit ill-conceived. I also note that the plaintiff's suit is strictly one to rectify a private wrong, as opposed to a suit brought for the benefit of the common weal.

I believe the facts in this case warrant a finding that special circumstances exist which would render an award of attorneys' fees to the plaintiff against the defendant to be unjust. Certainly, no one would reasonably suggest that in *every* zoning case, absent other circumstances, where a

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[7] Carey v. Piphus, ... U.S. ....., ..., 55 L.Ed.. 2d 252, 265, 266, 98 S.Ct. 1042, 1053 (1978): "More importantly, the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by deprivation of constitutional rights are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, *supra* at 1049-1050, these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question."

municipality's action deprived the property owner solely of procedural due process that the municipality should *ipso facto,* thereby, pay for the plaintiff's attorneys' fees because the plaintiff filed its suit based upon the Civil Rights Act rather than filing the suit as traditionally zoning suits have been filed. In this regard, it should be kept in mind that virtually all zoning cases involve a fact or an allegation that the property owner's constitutional rights have been violated.

If attorneys' fees are to be assessed against a municipality in every zoning case that a municipality loses based *solely* on a violation of procedural due process, absent other circumstances, it seems to me that the Illinois legislature should make that decision. In my opinion, judicial fiat should not make such an abrupt consequential change in the laws of this State since it would significantly affect not only municipalities but the taxpayers who would ultimately be paying for such awards.

Accordingly, I find and conclude that I should exercise my judicial discretion and not award attorneys' fees to the plaintiff because of the special circumstances that exist. (See, Chastang v. Flynn, 541 F. 2d 1040, 1045, 4th Circuit, Maryland (1976).) The plaintiff shall have judgment to recover costs against the defendant, to be taxed, but such costs shall not include attorneys' fees. The costs are to be taxed by the Clerk of the Circuit Court of Cook County. (See, Ill. Rev. Stat. (1977), Ch. 33, §§7, 25.) I further find that the plaintiff is not entitled to any relief or damages from the defendant except as expressly stated in this memorandum or any order or judgment entered pursuant to or as a result of this memorandum.

Judge Dom J. Rizzi

Dated: .....

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County, (County) (Municipal)

Department, Law, (Division) (District)

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

CITY OF EVANSTON, a municipal corporation,

Respondent.

ORDER

ORDER AND JUDGMENT

This cause having come to be heard for trial without a jury, and a full trial having been completed, proofs having been closed and the court being fully advised in the premises, the court finds and enters its findings, order and judgment as follows:

1. The court adopts and incorporates by reference as part of this Order and Judgment the *Trial Judge's Memorandum of Findings of Fact and Conclusions of Law* attached herewith, and all findings and conclusions in the said document and the findings and conclusions of this court and are made part of this Order and Judgment;

2. The court finds that the defendant's revocation of the extension of time to the plaintiff to correct the building violations violated the plaintiff's right to procedural due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States;

3. The defendant is hereby commanded to issue a special use permit to the plaintiff reasonably conforming to the special use permit that was issued to the plaintiff on March 25, 1974, with a reasonable allowance for sufficient time to correct and repair all existing building violations and whatever other violations presently exist with respect to the subject property;

4. An injunction is hereby entered enjoining the defendant from doing any act or taking any action inconsistent with the findings, conclusions and directions of this court as stated in this Order and Judgment or as stated in the said *Trial Judge's Memorandum of Findings of Fact and Conclusions of Law;*

5. The court finds that the plaintiff has not proven compensatory damages under the Civil Rights Act and that plaintiff is not entitled to compensatory damages under the Civil Rights Act;

6. The court finds that the plaintiff is entitled to and shall recover from the defendant nominal damages, in the amount of one dollar ($1.00), for violation of the plaintiff's right to procedural due process of law and judgment is hereby entered upon said finding in favor of the plaintiff and against the defendant in the amount of one dollar ($1.00);

7. The court finds that the plaintiff is not entitled to attorneys' fees as part of its costs or alleged damages in its alleged cause of action distinct from the Civil Rights Act;

8. The court finds that special circumstances exist in favor of the court exercising its judicial discretion to not award attorneys' fees to the plaintiff under the Civil Rights Act; and the court does hereby exercise its judicial discretion, because of said special circumstances, in not awarding attorneys' fees to the plaintiff under the Civil Rights Act;

9. The court finds that the evidence does not establish that the defendant violated any of the plaintiff's constitutional rights under the federal or Illinois constitutions as alleged in any of the counts in the second amended complaint, except as expressly stated *Memorandum of Findings of Fact and Conclusions of Law;*

10. The court finds that the evidence does not establish that there was a willful or malicious interference with any of the plaintiff's constitutional rights, privileges or guarantees, and the court finds that the plaintiff is not entitled to compensatory or punitive damages for any alleged willful or malicious interference with any of the plaintiff's constitutional rights under Count 7 of the Second Amended Complaint;

11. The court finds that the evidence does not establish that there was a willful or malicious interference with the plaintiff's property rights and business affairs, and the court finds that the plaintiff is not entitled to compensatory or punitive damages under Count 6 of the second amended complaint;

12. The defendant's counterclaim for an injunction is denied;

13. The plaintiff shall have judgment to recover costs against the defendant, to be taxed by the Clerk of the Circuit Court of Cook County, but such costs shall not include attorneys' fees;

14. The court further finds that the plaintiff is not entitled to any relief or damages from the defendant except as expressly stated in this Order and Judgment or as expressly stated in the said *Trial Judge's Memorandum of Findings of Fact and Conclusions of Law.*

ENTER:

Judge Dom J. Rizzi

August 21, 1978

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department, Law Division

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,
an Illinois not-for-profit corporation,

Plaintiff,

vs.

CITY OF EVANSTON, a municipal corporation,

Defendant.

No. 76 CH 6336

MOTION FOR RECONSIDERATION OF
ORDER AND JUDGMENT

Now comes the Plaintiff, by and through its attorneys, SINGER, STEIN & GREEN, and respectfully requests this Court to reconsider parts of its Order and Judgment set forth below, rendered August 21, 1978, and in support thereof, states as follows:

1. The Plaintiff states that the Court did not address, in its decision, Counts II, III, IV and V and therefore left unresolved a substantial portion of Plaintiff's complaint.

2. The Plaintiff states that competent proof with respect to damages was set forth during the testimony of Frank Spatz.

3. The Plaintiff states that the substantive due process and First Amendment rights of Plaintiff were violated and not merely "procedural due process."

4. The Plaintiff states that the reliance upon *Carey* v. *Piphus*, ... U.S. ....., 55 L.Ed.2d 252. 98 S.Ct. 1042 (1978) with regards procedural due process and damages is inapplicable to the case at bar and substantial damages for constitutional violations should be awarded.

5. The Plaintiff states that reliance upon *Carey* v. *Piphus, supra,* relative to special circumstances in denying attorneys fees pursuant to 42 U.S.C. §1988 is inappropriate and the Court's ruling does substantial injustice to Plaintiff. (See Motion and Memorandum relative to attorneys fees.)

6. The Plaintiff states that 42 U.S.C. §1988 in essence mandates the awarding of attorneys fees except under the most extreme circumstances not present in this cause.

WHEREFORE, the Plaintiff prays this Court:

A. Rule in favor of Plaintiff on Counts II, III, IV and V.

B. Expand its ruling re: procedural due process.

C. Award substantial damages to Plaintiff.

D. Rule that reasonable attorneys fees shall be awarded.

E. Grant such other relief that is just and equitable.

Respectfully submitted,

EDWARD T. STEIN

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County, (County) (Municipal)

Department, Law, (Division) (District)

ISKON

vs.

CITY OF EVANSTON

ORDER

This case coming to be heard before the Honorable Dom Rizzi on December 1, 1978 on the plaintiff's motion for reconsideration of order and judgment, this motion and any other pending motions are hereby denied.

ENTER:

Judge Dom J. Rizzi

December 1, 1978

ILLINOIS APPELLATE COURT

First District

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Plaintiff-Apellant,

vs.

CITY OF EVANSTON,

Defendant-Appellee.

ORDER

Plaintiff-appellant's petition for rehearing is hereby denied.

/s/ Maurice Perlin, Presiding Justice
/s/ John J. Stamos, Justice
/s/ Robert J. Downing, Justice

DATED: October 28, 1980

UNITED STATES OF AMERICA

STATE OF ILLINOIS SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and eighty-one, within and for the State of Illinois.

Present: JOSEPH H. GOLDENHERSH, Chief Justice

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood	Justice Daniel P. Ward
Justice Howard C. Ryan	Justice William G. Clark
Justice Thomas J. Moran	Justice Seymour Simon

Tyrone C. Fahner, Attorney General
Louie F. Dean, Marshal
Attest: Clell L. Woods, Clerk

Be It Rembered, that to-wit: on the 30th day of January 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioner

No. 54233

vs.

CITY OF EVANSTON,

Respondent

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs

by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this ..... day of ....., 19..... .

Clerk,

Supreme Court of the State of Illinois.

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON,
a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON,
a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a conventional zoning case. Its only distinctive characteristic is the fact that the petitioner is a religious organization. The controversy in question was simply whether or not the petitioner was entitled to a special use permit to utilize a building which it had purchased and occupied in the face of an ordinance prohibiting its use. The petitioner attempted to use 42 U. S. C. § 1983 as a vehicle to raise irrelevant First Amendment questions in what was essentially a traditional land use controversy.

The petitioner, in its statement of the case, carefully avoids the relevant facts which remove this controversy from the realm of constitutional considerations which would warrant this court's attention. The statement of fact is noteworthy not for what it says, but for what it omits.

On August 9, 1972 the petitioner entered into a lease for the premises at 1014 Emerson Street, Evanston, Illinois, with one Earl Zweifel. The term of the lease was October 1, 1972 through September 30, 1977. The premises in question were zoned for the C-2 district classification under the zoning ordinance of the City of Evanston. Under that classification, a theological school, church or temple is not a permitted use but is available only as a special use.

Under the provisions of the Zoning Enabling Act of the State of Illinois, special uses may be provided in municipal zoning ordinances. The statute provides:

> "Such uses may include but are not limited to public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property, and planned developments. A use may be a permitted use in one or more zoning districts, and a special use in one or more other zoning districts. A special use shall be permitted only after a public hearing before some commission or committee designated by the corporate authorities, with prior notice thereof given in the manner as provided in Sections 11-13-6 and 11-13-7." (Ill. Rev. Stat., 1979, ch. 24 § 11-13-1.1)

The zoning ordinance of the City of Evanston implemented the statutory grant of authority by designating special uses in the various districts and providing standards which had to be met before such special uses could be granted.

The statute in question provides that "the granting of permission thereof may be subject to conditions reasonably necessary to meet such standards." The validity of the special

use technique, including the establishment of conditions, has been widely accepted in Illinois and repeatedly sustained by its courts. *Kotrich* v. *County of DuPage,* 19 Ill. 2d 181 (1960); *Schmeisser* v. *Village of Niles,* 113 Ill. App. 2d 114 (1964); *City of Evanston* v. *Ridgeview House, Inc.,* 64 Ill. 2d 40 (1976).

At the time of entering into the original lease, the petitioner knew, or should have known, that its proposed use was not permitted under the zoning ordinance of the City of Evanston. Nevertheless the petitioner took possession of the premises on October 1, 1972. The building at that time was totally unfit for human habitation, although some forty members of the organization including children moved into the structure.

Notwithstanding the fact that at no time did the petitioner comply with the ordinances of the City of Evanston, it continued to utilize the structure in question for a temple and dwelling for its membership from October 1, 1972 until the spring of 1980.

The petitioner's statement of facts fails to note that the petitioner occupied the premises illegally and never relinquished the use of the premises until it voluntarily moved out in 1980 rather than comply with the ordinances relating to health and safety. Such compliance was required by the trial court as a condition of the special use permit. Thus, despite the alleged deprivation of due process, the petitioner in fact continued to use and enjoy the premises and no acts of the respondent ever created any loss of such use and enjoyment, notwithstanding the fact that said use was illegal for the entire duration of the petitioner's occupancy. This case represents a successful effort by the petitioner to flaunt the admittedly valid ordinances of the City of Evanston to illegally use the premises in violation of the zoning, building, housing, plumbing, electrical and other safety codes for eight years.

On October 4, 1972, having already moved into the premises in violation of the ordinances of the City, the petitioner first submitted its application to the Zoning Board of Appeals of the City of Evanston for a special use to allow "retention of the use of the building as a theological school with related uses." The Zoning Board of Appeals is an administrative body charged with conducting public hearings and making recommendations to the City Council on a variety of zoning matters including special uses.

The Board made an original recommendation approving the proposed use subject to certain terms and conditions *including compliance with all provisions of the zoning ordinance, building code, housing code and applicable City ordinances.* This recommendation was referred back to the Board by the City Council for further findings of fact. After additional hearings, the Zoning Board again reported back to the City Council that it recommended a special use "conditioned upon all violations of the Housing, Electrical, Plumbing, and Building Codes being corrected within 120 days of receipt of this recommendation by the City Council." It specifically recommended: "Failure to eliminate all violations of the Housing, Electrical, Plumbing and Building Codes within the aforesaid 120 day period shall result in a recommendation that this application be denied."

On March 25, 1974, the City Council adopted ordinance 7-0-74 granting the special use. The ordinance contained several conditions. Included were the elimination of all wholesaling and storage of incense on the premises or other commercial activities. An additional condition was that "all violations of the housing, electrical, plumbing and building codes shall be corrected within 180 days of the effective date of the ordinance." There was to be a maximum occupancy of 46. The 180-day period would expire on September 25.

The petitioner failed to apply for any permits to correct the multiplicity of violations. On September 18, the petitioner addressed a request to the Chairman of the Planning and

Development Committee of the City Council indicating that it had not brought the premises up to Code requirements and seeking an extension of time in which to meet the requirements of the ordinance in that respect.

On November 4, 1974, the City Council, without a hearing before the Zoning Board, purported to adopt Ordinance 90-0-74, which amended Ordinance 7-0-74. It extended the time for eliminating all violations of housing, electrical, plumbing and building codes to February 15, 1975. Additional conditions were also added to the special use. Certain permits were taken out by a contractor for the petitioner on November 5. These permits did not cover all the work required to be done to correct all violations.

On November 11, at its next regular meeting, the City Council reconsidered its previous action and withdrew the ordinance purportedly adopted on November 4, 1974. The petitioner continued to occupy the premises. On November 13, 1974, the petitioner was informed by certified mail, and the permits issued on November 5 were revoked. The special use permit granted in March of 1974 therefore expired by its own terms because of the failure of the petitioner to comply with the conditions which were imposed in the special use ordinance. *Goffinet* v. *County of Christian,* 65 Ill. 2d 40, 53 (1976).

On December 23, 1974, the petitioner filed a chancery proceeding in the Circuit Court of Cook County entitled: "*International Society for Krishna Consciousness* v. *City of Evanston, et al.,* " which was docketed as 74 CH 8132, wherein the petitioner sought to enjoin the City from interfering with any work carried out pursuant to the original permits and from interfering with the special use granted by Ordinances 7-0-74 and 90-0-74. On January 2, 1975, the petitioner sought a preliminary injunction, which was denied. The complaint of the petitioner was subsequently dismissed for want of prosecution. No appeal was taken.

On February 20, 1975, the petitioner purported to enter into an installment contract for warranty deed with Earl T. Zweifel, the owner of the property. The contract called for a purchase price of $100,000 with monthly installments of $1,266.80. On May 16, 1975, three months after the contract had been entered into, the petitioners again applied to the Zoning Board of Appeals for a special use permit to use the premises as a theological school with accessory uses. The Zoning Board of Appeals again recommended approval, subject to compliance with all other provisions of the zoning ordinance and other applicable laws, as well as the previous conditions originally imposed on the special use.

However, after consideration by the Planning and Development Committee, a standing committee of the City Council, the City Council denied the second application for a special use permit. The Committee based its recommendation on findings of fact which were reported to the City Council indicating that the applicant had not met the ordinance requirements for the granting of special uses, and because of the history of dilatory responses in meeting code requirements. The Committee also found that the applicant had not demonstrated that the use would not cause appreciable injury to the value of other property in the neighborhood and cited the dilatory responses to needed code corrections.

Following the denial of the special use permit by the City Council in September of 1976, the petitioner filed a second complaint in the Circuit Court of Cook County. Its motion for a preliminary injunction was denied. Subsequently, the petitioner amended its complaint seeking to transform a conventional zoning case in a 1983 action. An appeal was taken from the denial of the preliminary injunction. While this appeal was pending, the trial court granted a motion by the City for summary judgment. An appeal from this final judgment was consolidated and heard together in the case styled "*Inter-*

national Society for Krishna Consciousness v. *City of Evanston,* 53 Ill. App. 3d 443." During this entire period, the petitioner continued to occupy the premises using it as a temple and a dwelling for some forty persons without seeking to remedy any of the outstanding violations of the housing, building, plumbing and fire codes. During this period a fire took place in the premises but the petitioner remained in possession.

The Appellate Court reversed the Circuit Court of Cook County holding that the matter was not ripe for summary judgment. It also ruled that the City erred in reconsidering the extension of time originally granted in November of 1974. This holding was clearly erroneous and arose out of a misunderstanding of the ordinances in question. The court's erroneous view is particularly pertinent, because although the Appellate Court specifically held that it was not passing on the merits (A 37), its ruling with respect to the right to rescind the action extending the time for compliance became the basis for the trial court's subsequent ruling that there had been a deprivation of procedural due process. It subsequently became the sole basis for the Appellate Court's holding in its second decision.

The Appellate Court recognized that the City Council had the authority to reconsider and rescind its action under the usual rules of parliamentary procedure which gave the right to reconsider at the same or following City Council meeting. It correctly cited Ill. Rev. Stat., 1975, ch. 24 § 3-11-20, Rule 21.1 of the Evanston City Council and *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439 (1918) (A 31).

A legislative body's right to reconsider an act is, of course, basic and undisputed. The Appellate Court, however, looked beyond the act itself and concluded that the only reason for the reconsideration was the Corporation Counsel's opinion that an amendment to a special use ordinance could not be adopted without a public hearing. Although this opinion was absolutely

correct, the Appellate Court improperly attempted to determine the motivation of the City Council's action rather than merely considering the act of reconsideration itself.

In the first Appellate Court opinion, the court explained its basis for ruling that a public hearing was not necessary to amend a special use ordinance. It cited Section XII, C-4 of the zoning ordinance which provided that a special use permit shall not be valid after a period of one year except that "said period may be extended by the Council for such time as it shall determine, for good cause and without further hearing before the Board." The Appellate Court erroneously concluded that this provision was pertinent to the action of the City Council in extending the time for code compliance. (A. 30)

It overlooked the fact that the original special use ordinance was not being extended beyond one year but that in fact the ordinance adopted on November 4, 1974 changed the conditions of the special use and extended the period for compliance with code violations from September 25, 1974 (the original 180 days) to February 15, 1975. This clearly was not an extension by the Council of the special use permit beyond the one year period but in fact constituted an amendment to the original ordinance of March 25, 1974.

In its subsequent opinion found at 89 Ill. App. 3d 701, 708, the Appellate Court made no effort to correct this obvious error but instead merely relied upon its original holding without further analysis. This purported erroneous "revocation" was the single act which the Appellate Court found violated Krishna's procedural due process rights. (A. 10) Thus, whatever claim for violation of due process the petitioner now raises is based solely upon the act of the City Council on November 11, 1974.

It must be emphasized that there was in fact no violation of due process, procedural or substantive, because the City Council was proceeding in accordance with its own rules and case

law permitting reconsideration of a previously adopted ordinance for whatever reason. Clearly, there was in fact no deprivation of any rights because the petitioner remained in possession and at no time was deprived of the use of the premises by virtue of the City Council action on November 11, 1974.

The petitioner alleges that it was denied the right to introduce evidence of its denial of equal protection during the course of the trial. This claim is based upon the failure of the petitioner to lay the proper foundation for the admission of such evidence and the failure to prove comparability of circumstances, which, of course, was necessary to admit such evidence. The Appellate Court in its second opinion properly pointed out that the mere fact that a property owner has applied for a special use permit does not place the applicant within a single class which could serve as a model to which all special use applications must conform.

The court ruled that the trial court correctly excluded the evidence of other special uses as it had no evidentiary basis in the record upon which to find that Evanston had demonstrated clear and intentional discrimination. (A. 7) We suggest that the evidentiary rulings of the trial court as sustained by the Appellate Court were correct and hardly form a basis for consideration of this cause by this Court. The Appellate Court also ruled that the trial court correctly excluded Krishna's offer of proof.

The trial court's judgment order granted the petitioner a special use in accordance with the original ordinance. This included the condition of complying with all applicable code requirements within 180 days. The petitioner concedes it did not appeal from that finding, yet it made no effort to comply with this condition and in fact actually vacated the premises. This fact nowhere appears in the statement of facts in the petition but does appear in the Appellate Court's opinion. (A. 4, 13)

The Appellate Court also found that there was no cognizable substantive due process issue in Krishna's argument. (A. 6) The Court, moreover, specifically found that the property upon which the entire cause of action was based was no longer occupied by the group. The Court, therefore, declined to rule upon the substantive due process claim holding it to have become moot. (A. 5) As a matter of fact, petitioner subsequently sold the property at a price exceeding that which it paid in 1975.

We thus have a situation where petitioner occupied the premises in violation of the building, housing, electrical, plumbing and other codes for eight years without a special use permit as required by the zoning ordinance. Despite its controverted claim of a denial of "procedural due process," it voluntarily relinquished the premises and suffered absolutely no loss or damage. Having profited by its uninterrupted violation of the Evanston police power ordinances, the petitioner now seeks this Court's jurisdiction solely for the purpose of seeking attorneys fees and a purported redress of a deprivation of its rights which in fact never took place.

ARGUMENT

INTRODUCTION

We do not question the fact that state courts have been granted jurisdiction over § 1983 litigation. We suggest, however, that a mere claim of deprivation of rights under a zoning ordinance is not sufficient to give rise to a substantial federal question. This Court has in fact ruled that no such substantial federal question exists in a comparable situation. It dismissed for want of a substantial federal question the case of *Corporation of Presiding Bishop* v. *Porterville,* 338 U. S. 805, 70 S. Ct. 78 (1949). Subsequently this Court cited the *Porterville* case in another opinion with respect to freedom of religion. *American Communications Association* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925 (1950). The Court at page 943 noted,

> "We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 338 US 805, ante, 487, 70 S Ct 78 (1949).

This Court subsequently denied certiorari in an Illinois case, *St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, 395 U. S. 946, 23 L. Ed. 2d 464 (1969) involving the denial of a special use permit for a church.

We also have no question that a municipality may be sued under § 1983. However, it should be pointed out, that unlike the holding in *Monell* or *Owen* this case does not involve a substantial violation of due process. It involves a controversy over the parliamentary procedure to be followed under Illinois law on reconsideration of an ordinance. Krishna, the petitioner, was never ousted from its premises. It was permitted to make repeated applications for a special use permit, which applications were considered on their merits and the first of which was granted. It was the petitioner's failure to comply

with that first ordinance which resulted in the subsequent denial. The controverted procedural defect, if there was one, does not rise to the magnitude of a constitutional deprivation.

The petitioner suggests that a significant body of federal case law exists to the effect that the passage of an ordinance which results in a constitutional deprivation to a plaintiff is the intent required to be shown under § 1983. Here, of course, there was no passage of an ordinance which resulted in a constitutional deprivation to the petitioner, merely the reconsideration of an extension of time to make repairs. It seems clear, moreover, that as held by the Appellate Court in order for a violation of the Fourteenth Amendment to be established, intent must be shown. *Arlington Heights* v. *Metropolitan Housing and Development Corp.*, 429 U. S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977); *Washington* v. *Davis*, 426 U. S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), *City of Memphis, et al.* v. *Green et al.*, ____ U. S. ____ (#79-1176 decided April 20, 1981). We suggest that § 1983 as interpreted in *Monell* and *Owen* does not justify the award of damages or attorneys fees in the case at bar.

I.

THERE WAS NO VIOLATION OF § 1983 BY THE CITY OF EVANSTON.

This case does not involve an effort by a municipality to deprive the petitioner of its constitutional rights. The petitioner would seek to impose absolute liability on the part of a municipality because the Appellate Court found a technical violation of procedural due process rights. The petition fails to point out wherein the petitioner was in any way damaged by the act of the City in rescinding the extension of time in a proper parliamentary manner. Whether the corporation counsel's opinion was correct, and a public hearing was required before the conditions could be varied (as opposed to a mere

extension of time for a special use permit) or whether the reconsideration was prompted by other factors not apparent in the record, is immaterial. The record shows that petitioner continued to utilize the premises in question and in fact suffered no injury, while it proceeded to enter into a contract to purchase the property, notwithstanding the fact that it had no special use permit.

The petitioner would transform *Monell* and *Owen* into an absolute requirement that any technical violation of procedural due process must result in damages and attorneys fees. This Court, however has recently recognized that § 1983 does not provide for a raid on the public treasury when no actual damages are shown. *City of Newport et al.*, v. *Fact Concerts, Inc.*, No. 80-396, decided June 26, 1981. The petitioner in the trial court did succeed in having a declaration that the revocation was illegal and an order reinstating the petitioners special use permit. The petitioner chose not to avail itself of that special use permit and never sought the permits required to meet the conditions including compliance with applicable city ordinances. The petitioner, instead, chose to vacate the property in 1980 rather than complying with admittedly valid police power ordinances and subsequently sold the property at a profit.

Thus, there can hardly be a contention that the 1974 reconsideration of the time extension caused any damages to the petitioner. Its failure to avail itself of the relief it purportedly sought is indicative of the fact that the action in the Illinois Appellate Court and in this Court is nothing more than a search for attorneys fees and some kind of punitive damages, hardly grounds for consideration by this Court on a petition for writ of certiorari. The Appellate Court's opinion may be wrong in finding that there was a due process violation. It certainly was not wrong in denying all relief. There was absolutely no injury shown to the petitioner.

The petitioner concedes that there was no evidence in the record that the City Council relied upon the corporation counsel's opinion when it voted to reconsider the extension of time. Since the City Council undoubtedly had full authority to reconsider its action and no damages resulted from its reconsideration, there can have been no violation of § 1983. The petitioner ignores the fact that the respondents defense was not based upon its attorney's interpretation of the zoning ordinance. The thrust of Evanston's defense at all levels was simply the fact that the denial of the special use under all the facts and conditions was a proper exercise of its police power and did not deprive the plaintiffs of their First Amendment rights.

The Appellate Court's first opinion was based upon its view that summary judgement was improper on the state of the record. It carefully avoided any attempt to rule on the merits. Its gratuitous holding with respect to the revocation of the extension of time was totally unnecessary to its decision on the question of summary judgment and was dicta at best. It was unfortunate that it relied upon that dicta to find a technical violation of due process in its second opinion, although it properly held that this technical violation did not give rise to a violation of § 1983. The Appellate Court properly found that the petitioner was not entitled to relief because it had not proven any intentional or malicious or reckless conduct by Evanston. It could very well, have held that there was no grounds for relief because the petitioner in fact had not been damaged.

The petitioner cites several Seventh Circuit decisions for the proposition that a § 1983 plaintiff is not charged with the responsibility of showing malice or intent on the part of the defendant. As a matter of fact, the decisions cited hold directly to the contrary. In the case of *Bonner* v. *Coughlin,* 545 F. 2d

565 (7th Cir. 1976), the Seventh Circuit relied upon *Paul* v. *Davis,* 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) for the proposition that

> "The Supreme Court refused to hold that the due process clause of the Fourteenth Amendment and § 1983 'make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claim.' "

In *Paul,* this Court rejected the concept that § 1983 created a body of general federal tort law. In *Bonner,* the Seventh Circuit went on to hold that

> "The dissenting Justices in *Paul* were of the view that 'intentional conduct' infringing a person's liberty or property interests without due process of law is within the reach of Section 1983 (424 U. S. at 720, 96 S. Ct. at 1170.) They went no further, nor need we."

The Seventh Circuit in *Bonner* went on to say:

> "We hold that the negligence of the guards which caused the loss of Bonner's transcript was not a State deprivation of property without due process of law under the Fourteenth Amendment nor action 'under color of state law' under Section 1983."

To the same effect was the case of *Jamison* v. *McCurrie,* 565 F. 2d 483 (7th Cir. 1977), where the Seventh Circuit at page 486 said:

> "There is no constitutional cause of action for mere negligence on the part of police officers in the case such as this. The plaintiff must show that their misbehaviour was either intentional or in reckless disregard of his constitutional rights. *Bonner* v. *Coughlin,* 545 F. 2d 565 (1976)."

In the later case of *Beard* v. *Mitchell,* 604 F. 2d 485 (7th Cir. 1979), the Seventh Circuit again insisted that mere negligence was insufficient to show a violation of constitutional rights. At page 494, the Court said:

"After our decision in *Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (*en banc*), *cert. denied,* 435 U. S. 932, 98 S. Ct. 1507, 55 L. Ed. 2d 529 (1978), we are surprised at the vigor with which plaintiff argues that Mitchell can be held liable for negligently causing Jeff Beard's death. This court, in an *en banc* opinion, refused to recognize a cause of action premised on negligence, holding that intentional conduct or 'reckless disregard' was an essential element of a civil rights claim. Plaintiff contends that the *Bonner* intent standards were formulated for the limited context of claims arising under the Eighth Amendment. The reasoning in *Bonner* is not so limited, and in fact this court has previously held that recklessness is required to recover for deprivations of life, liberty or property without due process under the Fourteenth Amendment. See *Fultom Market Cold Storage Company* v. *Cullerton,* 582 F. 2d 1071, 1080 (7th Cir. 1978) (property); *Jamison* v. *McCurrie,* 565 F. 2d 483, 486 (7th Cir. 1977)"

In a post-*Monell* decision, *Stringer* v. *City of Chicago,* 464 F. Supp. 887 (N. D. Ill., 1979), the District Court for the Northern District of Illinois was considering a civil rights case brought against a municipality. At page 890, the Court carefully analyzed the question of strict liability under § 1983. It said:

"No precedent supports the notion of strict liability under § 1983. Indeed, the Seventh Circuit, joined by most other circuits, has held that in order to prevail on a claim under § 1983 a plaintiff must prove malicious or reckless conduct, and that negligence alone is insufficient. *Jamison* v. *McCurrie,* 565 F. 2d 483 (7th Cir. 1977); *McDonald* v. *State of Illinois, supra; Little* v. *Walker,* 552 F. 2d 565, 568 (7th Cir. 1976) (collecting cases); see also *Procunier* v. *Navarette,* 434 U. S. 555, 98 S. Ct. 855, 865, 55 L. Ed. 2d 24 (Burger, C. J., dissenting).

While these cases involved actions against individual defendants, there would appear to be no basis on which to distinguish post-*Monell* actions against municipalities. In posting the requirement of malicious or reckless conduct,

the Seventh Circuit has relied on the notion that § 1983 is apparently limited in its essential purpose to the redress of intentional—defined as malicious or objectively reckless—violations of constitutional rights inflicted through the exercise of official authority. In *Bonner* v. *Coughlin, supra,* the court observed:

> The dissenting Justices in *Paul* [v *Davis,* 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)] were of the view that 'intentional conduct' infringing a person's liberty or property interests without due process of law is within the reach of § 1983 [citation omitted]. They went no further, nor need we. If Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way. 545 F. 2d at 567.

See also Paul v. *Davis, supra,* 424 U. S. at 717, 96 S. Ct. 1155. Such a view does not readily lend itself to exceptions based on the type of defendant involved. Further the application of an intent requirement to actions against municipalities will not create serious conceptual difficulties, since the recklessness standard is an objective one. *See Little* v. *Walker, supra,* 552 F. 2d at 198, n.8."

This Court's view of the necessity of establishing intent in order to constitute a violation of civil rights has been repeated in such cases as *Washington* v. *Davis, Arlington Heights,* and most recently in the *City of Memphis* street closing case. Moreover, the Court has recognized that mere negligence is insufficient to state a cause of action under § 1983 regardless of whether a constitutional violation existed. See *Wood* v. *Strickland,* 420 U. S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975), at page 322. In that case the Court insisted that there was no immunity if action was taken with malicious intent to cause a deprivation of constitutional rights or other injury to the student. The Court said:

> "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the con-

> stitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson* v. *Ray,* 386 US, at 557, 18 L Ed 2d 288. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

See also, *Procunier* v. *Navarette,* 434 U. S. 555, 55 L. Ed. 2d 24, 98 S. Ct. 885 (1978). In *Baker* v. *McCollan,* 443 U. S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979), this Court specifically refused to hold that mere negligence gave rise to a cause of action under § 1983. The Court again noted that the Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished without due process of law.

The petitioner acknowledges that the municipal defendant can act only through its agents, but asserts that the council members would have known that a revocation of special use permit was taking place without notice and hearing, and was substantially certain to result in the loss of petitioner's building permits. It is contended that as a matter of law, that conclusion meets the level of intent required by tort law.

It must be emphasized that the City Council was not engaged in revoking special use permits without due notice and hearing. The special use permit had expired by its own terms under Illinois law because the petitioner had not complied with the conditions imposed, namely, bringing the property up to applicable code standards within 180 days. The law is clear in Illinois that failure to meet such a standard resulted in the automatic termination of the special use permit. *Goffinet* v. *County of Christian,* 65 Ill. 2d 40, 53 (1976).

The petitioner persists in treating the procedural step of reconsideration as a revocation of the special use permit. No such revocation was taking place. What happened was that the City Council merely reconsidered its action of the week before in extending the time in which compliance with code standards was to take place. There was clearly no intent to deprive the petitioner of any constitutional rights. It had no constitutional right to violate the valid police power ordinances of the City.

The Appellate Court's view of the law as stated by the Seventh Circuit was, of course, absolutely correct as we have indicated from the citations above. The Appellate Court properly considered this Court's decision in *Owen* and found it inapplicable because no 1983 violation had taken place. Contrary to the petitioner's argument, the standard applied is not necessarily "bad faith". The contention of the petitioner that the Appellate Court misread the Seventh Circuit's standard of intent simply is erroneous.

The petitioners likewise misread *Monell. Monell* clearly holds that a municipality may not avail itself of the qualified immunity of its agents. That is not what is involved in this case. The acts were not those of any agents. The acts in question were those of the City Council itself in exercising its undoubted right to reconsider its action of the previous week. The petitioner does not argue that the City Council did not have the authority to refuse the extension of time request. The mere fact that the Council apparently granted the extension one week and rescinded it the next in accordance with its own rules, the state statute, Robert's Rules of Order, and the decided case law in Illinois, does not demonstrate a violation of constitutional rights or a violation of due process.

The petitioner raises the rhetorical question of whether "a litigant has a course of action against the City Attorney for malpractice? negligence?" and concludes that there is no alternative remedy. There is no remedy simply because there

was no wrong. Reliance upon the Fourth Circuit opinion in *Huemmer* v. *Mayor and City Council of Ocean City,* 632 F. 2d 371 (4th Cir. 1980) is, of course, misplaced, because the respondent here was following its statutory right to reconsider an action and not relying upon an ordinance whose unconstitutionality was evident. As the quotation from *Monell* in the petition indicates, a municipality will be liable for all of its injurious conduct. There was no injurious conduct here. There was no violation of due process. There was no constitutional tort. There was no violation of § 1983.

II.

THE COURT PROPERLY DENIED ATTORNEYS FEES UNDER 42 U. S. C. § 1988.

The basic purpose of this petition is to seek attorneys fees on behalf of the petitioner's counsel. The trial court and the Appellate Court both denied attorneys fees. The trial court's denial was made notwithstanding the fact that the petitioner had in fact prevailed on one of its seven counts, i.e., a technical violation of procedural due process. The trial court held, however,

> "The constitutional violation involves *solely* procedural due process. There is absolutely no evidence that it involves the invidious characteristics of racial, religious, ethnic, employment or sex discrimination; nor is there sufficient evidence to establish bad faith or malice or willful and hateful discriminatory conduct; nor is there a pattern or *modus operandi* abridging constitutional rights." (A. 57)

The court held that the defendant's action was within the ambit of its proper legislative function and that the plaintiff's suit was strictly one directed by a private wrong, as opposed to a suit brought for the benefit of the common weal. (A. 58) The court pointed out that no one would reasonably suggest that in

every zoning case absent other circumstances where a municipality's action deprived the property owner solely of procedural due process, the municipality should pay plaintiff's attorneys fees because the plaintiff filed under the Civil Rights Act rather than filing a suit as traditional zoning suits have been filed. The Court concluded:

> "In this regard, it should be kept in mind that virtually all zoning cases involve a fact or an allegation that the property owner's constitutional rights have been violated." (A. 59)

The Court therefore exercised its discretion and did not award attorneys fees, citing *Chastang* v. *Flynn*, 541 F. 2d 1040, 1045, (4th Cir. 1976). (A. 59)

The conclusion reached by the Appellate Court was that the petitioner was not the prevailing party and therefore under no circumstances was it entitled to an award for attorneys fees. (A. 13) It must be emphasized that even at the trial level, the petitioner prevailed on only one of the seven counts. The trial court granted only the prayer of the first count seeking a declaratory judgment that the action of the City purporting to withdraw the special use permit extension was a deprivation of plaintiff's rights. By the time the case got to the Appellate Court, Count I had been rendered moot by the petitioner which had abandoned its use of the property and the Appellate Court so held. Thus, the substantive issue in a seven count complaint upon which the petitioner prevailed was rendered moot by the petitioner's own action before the Appellate Court had an opportunity to pass upon it. We have the anomalous situation of the petitioner claiming to have prevailed on a count which its own action rendered moot after the City had appealed an adverse finding. The Appellate Court could well have reversed the lower court's ruling directing the re-issuance of the special

use permit. Then, of course, there could have been no contention that the petitioner prevailed. The petitioner's own acts prevented such consideration by the Appellate Court.

The petitioner, of course, was not the prevailing party in the Appellate Court. The only part of the trial court's opinion that was reversed was the holding that it was entitled to even the one dollar compensatory damages. The Appellate Court specifically held:

> "Krishna has not succeeded in adequately meeting the requirements under § 1983 for either due process claim or for the equal protection claim. It is evident that Krishna could have no valid argument for the argument for the award of compensatory damages." (A. 13)

The cases cited by the petitioner in the second portion of its argument do not sustain its contention that it is entitled to attorneys fees. It presumes that it is the prevailing party. The very opinion sought to be reviewed specifically holds that it is not the prevailing party. Its own action prevented a review on the merits of the single count in which the trial court had found for the petitioner.

The case of *Maher* v. *Gagne,* does not lend support to the petitioner's claim. *Maher* turned on the question of whether an attorneys fees award can be assessed against a State under the Eleventh Amendment upon settlement of an action in which plaintiff clearly prevailed. In the case at bar, the petitioner could under no circumstances be said to have been the prevailing party. It lost on six of the seven counts in the trial court. It got a judgment of one dollar which was reversed. Although the trial court also awarded a special use permit, it was conceded that the petitioner in fact abandoned the special use permit by never seeking the requisite building permits to remedy the code violations and by relinquishing the use of the property before the case was argued.

Also cited is *New York Gaslight Club, Inc.* v. *Carey,* 447 U. S. 54, 64 L. Ed. 2d 23, 100 S. Ct. 2024 (1980). The Court emphasized in a Title VII case that the purpose of § 1988 was to make it easier for plaintiffs of limited means to bring a meritorious suit. The Court emphasized, moreover, that Congress had cast the Title VII plaintiff in the role of a private attorney general vindicating a public policy of the highest priority. The Court concluded that it was clear that Congress intended to facilitate the bringing of discrimination complaints which had a broad impact.

In the instant case, as the trial court noted, the petitioner was not acting as a private attorney general to vindicate general civil rights. It was involved in a purely private zoning dispute having absolutely no constitutional impact beyond its own disputed use of a single piece of property. The petitioner far from a plaintiff of limited means, is in fact a highly successful money-raising organization, which has made a career in the state and federal courts challenging all types of municipal regulation. This case does not involve the kind of basic civil rights controversy in which a plaintiff of limited means is entitled to attorneys fees in order to vindicate a general and basic constitutional right which has great public importance.

The petitioner also cites *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). That case, however, merely limited the circumstances under which there could be an award of attorneys fees to successful defendants. The court there pointed out not only that the district court had discretion but that the awarding of Title VII plaintiffs attorneys fees was based primarily on the intent of Congress to cast the plaintiff in the role of a private attorney general.

In its petition, Krishna cites the trial court's view that the defendant's revocation of the extension of time was arbitrary and capricious and without procedural due process of law. It,

however, ignores the finding of the trial court in the exercise of its discretion that no attorneys fees should be paid under the facts of this case. There was clearly no abuse of discretion on the part of the trial court. The Appellate Court determined that the petitioner was not the prevailing party and, therefore, not entitled under any circumstances to attorneys fees. It, in fact, specifically raised the question as to whether or not the City, as the prevailing party was entitled to attorneys fees under § 1988. (A. 13) The Appellate Court dissolved the injunction entered by the circuit court and reversed the finding in favor of Krishna on the procedural due process claim. The holding of the trial court that there could be no attorneys fees was affirmed. (A. 14)

The petitioner's claim that an improper use of the Court's narrow discretion to deny fees could damage the utility of the statute by discouraging attorneys from accepting otherwise meritorious cases is clearly unfounded. This case is nothing but a garden variety zoning case. An attempt has been made to utilize § 1983 for the sole purpose of seeking attorneys fees. Not only was the trial court exercising its sound discretion in denying attorneys fees despite holding for the petitioner on one of seven counts, but the Appellate Court properly reversed the single finding in the petitioner's favor and, of course, determined that the petitioner was not entitled to attorneys fees.

It, again, must be emphasized that the trial court's order to reissue the special use permit was rendered moot by the petitioner's action, thus, precluding the respondent from reversing on the merits. To hold that under the facts of this case the petitioner is entitled to attorneys fees would pervert the function of § 1988. Such a holding would have dire consequences for every municipality that dared to defend itself when its police power ordinances were blatantly ignored and then challenged with a specious constitutional claim.

III.

THE PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED BY THE ACTION OF THE CITY OF EVANSTON.

The petitioner here seeks to cloak itself in the First Amendment. It asserts that the denial of an extension of time to comply with code violations was to deny it the free exercise of religion. That statement is patently false and is illustrative of the willingness of this petitioner to twist the law in its search for attorneys fees and damages for non-existent injuries.

This case does not involve infringement of freedom of religion. The fact of the matter is that in its sensitivity to religious institutions, the City countenanced the illegal occupancy of deteriorating premises for eight years. The petitioner bought the property notwithstanding the fact that it was not zoned for the purposes sought. The petitioner then moved in and utilized the property uninterrupted for a period of eight years during which time it consistently refused to comply with applicable health and safety codes and finally moved out before the final adjudication by the Appellate Court rather than comply with the conditions of the special use which the trial court had directed.

The law is absolutely clear that religious institutions are subject to municipal zoning ordinances and that the refusal to issue a special use permit for a church does not violate the First Amendment. As indicated above, this Court recognized that fact in *American Communications Association* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925, 943, where reference was made to the dismissal of an appeal for want of a substantial federal question when a church group contended that its First Amendment rights were violated by a zoning ordinance preventing the building of churches in certain residential areas.

The law in Illinois is absolutely clear in this regard. *St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, leave to appeal denied 40 Ill. 2d 78, *cert. denied,* 395 U. S. 946, 23 L.

Ed. 2d 464 (1969) See also *Coston Chapel A.M.E. Church* v. *Chaddick*, 9 Ill. App. 3d 321 (1972); *South Side Move of God Church* v. *Zoning Board of Appeals*, 47 Ill. App. 3d 723 (1977). The view of the Illinois courts and this Court has been followed by courts throughout the nation. All of them hold that churches and other religious institutions are subject to zoning ordinances and that there is no infringement of constitutional rights to freedom of religion because a zoning ordinance prohibits the location of a church in a specific location requested. See for example, *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823; *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen*, 330 P. 2d 5, 27; *Minney* v. *City of Azusa*, 330 P. 2d 255, 259, 266; *Smith* v. *United Presbyterian Church*, 331 Mich. 1, 52 N. W. 2d 568; *Zion Evangelical Lutheran Church* v. *City of Detroit Lakes*, 21 N. W. 2d 203.

We do not question that protection of the free exercise of religion has been accorded a special place in our jurisprudence. We state unequivocally, however, that no freedom of religion is involved when a valid zoning ordinance restricts the location of churches or requires a special use permit as in the case at bar.

In the instant case the City of Evanston originally granted a special use permit to petitioner. It had no desire or intent in any way to preclude the exercise by the petitioner of its religious rights under the First Amendment. Those rights, however, were subject to the police power of the municipality which involved not only the zoning ordinance but the building code, the fire code, the plumbing code and the other police power measures required to protect the public health and safety. When the petitioner continued to flaunt those ordinances, notwithstanding the good will exhibited by the City in overlooking the fact that the petitioner had moved in violation of the ordinance and was occupying the premises without a special use, the City had no reasonable alternative but to deny the continued occupancy which posed a threat to the 40 people living in the building and to the surrounding neighborhood. It

degrades the high position accorded to religious freedom under our constitutional framework to use a religious claim under the circumstances present in the case at bar to prevent the legitimate exercise of municipal power.

No court has ever applied "the compelling state interest" to determine whether or not a religious institution is subject to a zoning ordinance. In fact, as the Appellate Court noted, Krishna did not challenge the validity of legislation requiring religious facilities to acquire special use permits in order to operate in certain limited areas where they are zoned as non-permitted uses. The Appellate Court specifically stated that it was unable to find a cognizable substantive due process issue in Krishna's argument to the court. (A. 6)

The City did not deny ISKON's right to worship at this location. It denied the right of ISKON to utilize a building for public assembly and residential use that was replete with dangerous code violations. When the petitioner demonstrated clearly its unwillingness to comply with the applicable codes, the City then, more than two years after initial occupancy, refused to grant a second special use permit.

The final contention that the Illinois court refused evidence as immaterial and irrelevant which would have shown dissimilar treatment of other religious groups is simply incorrect. As the Appellate Court held, there was a total lack of foundation to demonstrate that any of the evidence sought to be introduced was in any manner comparable to the case at bar. There is no basis in the record for any contention of First Amendment religious discrimination. The record is, in fact, all to the contrary. The City of Evanston exercised infinite patience and gave every opportunity to this petitioner to meet the minimal standards of its public health and safety codes. The continued refusal to meet these standards left the City no choice but to deny the special use. To now claim that First Amendment religious freedom rights were violated is simply an additional indication of the hypocrisy and disregard for law which has manifested itself in the petitioner's behaviour since it first illegally occupied the premises in question.

CONCLUSION

We respectfully suggest that the petition for writ of certiorari fails to indicate any basis for this Court's consideration of what is fundamentally a routine zoning case involving at best purported procedural irregularities. The record below demonstrates that the petitioner leased the property with at least constructive knowledge of the fact that its use was not permitted. It subsequently purchased the property having failed to secure a special use permit because it would not comply with the applicable codes. It then continued to occupy the premises in violation of the City's ordinances, all the while claiming religious persecution.

The only peg upon which the petitioner bases its constitutional claims is an alleged deprivation of procedural due process. To the extent that the Appellate Court accepted such a proposition, the Appellate Court was in error, but the Court recognized there was no malice or intent to deprive this petitioner of its rights and in fact no damages ensued.

The petitioner precluded a review of the substantive issue by moving from the premises and subsequently selling the property at a profit. We suggest that it should not be permitted to utilize this Court for the purpose of attempting to extract attorneys fees and damages when no basis for either exists. The petition should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1838

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

INTERNATIONAL SOCIETY FOR
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Petitioner,

vs.

THE CITY OF EVANSTON, a
Municipal Corporation,

Respondent.

On
Petition for a Writ of Certiorari to the
Illinois Appellate Court, First District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

INTRODUCTION

In its Brief, Respondent avoids the central questions raised by Petitioner and totally ignores the effects of two cases recently decided by this Court.[1] Instead,

1. Parratt v. Taylor, ___U.S.___,(cont.)

Respondent, by dwelling on "facts" not contained in the record, attempts to reargue issues decided against Respondent which are not pertinent to the important legal and constitutional questions raised in the Petition.

The Brief in Opposition's Statement of the Case inaccurately portrays the procedural and substantive history of this case. Respondent argues throughout its Statement that because of purported irregularities in the use of Petitioner's premises and because of numerous building code violations, Petitioner was neither entitled to a special use at the outset nor did an unconstitutional revocation ever occur. But whatever supposed "irregularities" may have occurred prior

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1. (cont.) 101 S. Ct. 1908 (1981); Schad v. Borough of Mt. Ephraim, ___U.S.___, 101 S.Ct. 2176(1981).

to the issuance of a special use permit were sanctioned by the City when it granted the use. Respondent thus has waived its argument that Petitioner was a "trespasser." After recognizing and accepting Petitioner's use by first granting the permit and later by extending it, Respondent cannot now be heard to argue that the use itself was not legal. (App. to Cert. Petition A38-A59).

Furthermore, Respondent's assertions that the existence of building code violations precluded the issuance of a new or extended special use permit presents a classic "Catch-22" situation, as the trial judge cogently explained:

> The evidence establishes that before a contractor can correct the building violations it must receive permits from the Department of Inspections and Permits. The Department of Inspections and Permits, however, will not issue any permits to make the corrections because the plaintiff does not have a special use permit, and the

> defendant effectively rescinded the plaintiff's special use permit when it revoked the extension of time to make the corrections. Thus, the plaintiff finds itself in a "Catch-22" situation. It cannot, theoretically, be issued a special use permit because of the building violations and it cannot correct the building violations because it does not have a special use permit. It is hard to imagine a more ridiculous postulation. It is tantatmount to giving the plaintiff the "option" of having to fit a round peg into a square hole or a square peg into a round hole.

(App. to Cert. Petition A45)

Respondent also reargues that the revocation of the extension of the special use permit was not a revocation at all, but a legitimate reconsideration. This issue, however, was disposed of by the lower courts, which found the revocation to be an unconstitutional deprivation of procedural due process. (App. to Cert. Petition A10, A48). An examination of Carey v. Piphus, 435 U.S. 247 (1978), reveals that decision to have been

correct. Respondent's argument focuses not upon case law and legal analysis but upon the factual points resolved against Respondent in the lower courts. Respondent's claim that the first appellate court's decision (App. to Cert. Petition A20-A37) was not a finding on the merits is without foundation. Respondent never appealed that decision. The second appellate opinion (App. to Cert. Petition A1-A14) again reaffirms the finding that Petitioner was denied procedural due process. Respondent's claim that the lower court was right but for the wrong reasons is not supported by the specific findings of the trial and appellate courts.

Finally, throughout its Brief, Respondent assigns great importance to Petitioner's having ultimately vacated the premises; the Brief also goes outside of

the record to make assertions concerning the disposition of the property. That discussion is irrelevant, as the legal questions raised herein are not moot. The violation of sec. 1983 is a fact -- it cannot be erased. Therefore, the questions of Petitioner's entitlement to damages and attorneys fees remains. To deny relief here would condone Respondent's denial of due process and would permit a wrong without providing a remedy.

PETITIONER STATED A CAUSE OF ACTION UNDER SEC. 1983.

Petitioner, in its Petition for Certiorari, discusses the existence of a cause of action under sec. 1983 here. Since the writing of that brief, this Court decided Parratt v. Taylor, ___U.S.___, 101 S.Ct. 1908 (1981). Respondent devotes fully one-third of its

Brief to a refutation of Petitioner's argument concerning the lack of an intent standard as an element of a sec. 1983 claim, and in so doing, totally ignores the inescapable force of Parratt. In fact, that case is not even cited. It is Petitioner's position that although its Petition set out how, even before Parratt, it possessed a cause of action under sec. 1983, in light of Parratt that discussion seems almost academic. Parratt obviates a finding that any particular intent was present in order to make out the elements of a sec. 1983 cause of action. The Court instead directs attention to whether a constitutional deprivation took place under color of law. Id., 101 S.Ct. at 1913.

Here, a constitutional deprivation was found and there is no question that in passing the ordinance which denied Petitioner its rights, the Evanston City

Council was acting under color of law. See Petition for Certiorari at 13. Since Parratt resolved the state of mind question, it is clear that the Petitioner made out the requisite elements of a sec. 1983 action.

Petitioner is therefore baffled by Respondent'sreliance on City of Memphis v. Greene, ___ U.S. ___, 101 S.Ct. 1584 (1981); Arlington Heights v. Metropolitan Housing & Dev. Corp., 429 U.S. 252 (1977); and Washington v. Davis, 426 U.S. 229 (1976), to support the proposition that no cognizable sec. 1983 action exists here. Respondent's Brief at 12, 17. Those cases[2] are inapposite -- Arlington Heights and

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2. Petitioner is also confused by Respondent's reliance upon City of Newport v. Fact Conerts, Inc., ___ U.S. ___, 101 S.Ct. 2748 (1981) in its discussion of this issue, see Respondent's Brief at 13, since Petitioner has not requested punitive damages.

Washington v. Davis concerned a violation of the equal protection clause when racial discrimination is at issue. Memphis v. Greene concerned a cause of action brought under 42 U.S.C. sec. 1982 and also under the Thirteenth Amendment. Moreover, Respondent's analysis obscures the distinction between a possible state of mind requirement with regard to the underlying constitutional deprivation and the lack of a state of mind requirement with regard to the statute itself.

Moreover, on a policy level, the Parratt opinion expressed particular concern that state procedures be utilized when seeking legal redress for deprivations of constitutional rights. That is exactly what Petitioner did here. This action was brought in state court and state claims were raised in addition to

the sec. 1983 claims. This Court should ensure that state courts do not restrict the rights of sec. 1983 plaintiffs by unduly constricting the parameters of a cognizable action. Petitioner, as well as others, should have a complete forum in state court.

PETITIONER IS ENTITLED TO ATTORNEYS FEES UNDER SEC. 1988

For similar reasons, the denial of fees in this case raises serious and substantial legal questions. The effects of an erroneous denial of fees under sec. 1988 can practically be as serious as the erroneous constriction of sec. 1983 discussed above. Parratt also highlights the substantiality of the sec. 1988 question. By emphasizing the existence of a sec. 1983 cause of action here, it magnifies the implications of the denial of fees.

Respondent justifies the lower court's denial of fees by invoking the special circumstances doctrine and relying on several specific grounds: first, that Petitioner prevailed on only one of seven counts at the trial level. However, this ignores the fact that Count I embodied all the relief Petitioner requested. By granting relief on Count I, it was unnecessary to rule on the other counts. The overwhelming and overriding issue was Petitioner's right to remain and practice their religion -- this issue was won when the injunction issued. The trial court also found that a sec. 1983 action existed and found a procedural due process deprivation. The loss of damages and attorneys fees, while important, would not by itself ensure the vindication of Petitioner's First Amendment rights. To

illustrate, suppose the injunction had been denied, but damages granted -- Petitioner would still be without a place to worship. However, the converse is not true.

Respondent further justifies this result by referring to the appellate court's declaration that the substantive due process and First Amendment questions here were moot. Even if they were, that point is irrelevant. Having won on the procedural due process issue, fees should have been granted.

Moreover, it is also irrelevant that Petitioner was not acting as a private attorney general and that it is not a plaintiff of limited financial means. The Fifth Circuit recognized, very recently, that such issues do not constitute the presence of special circumstances to deny

fees and that the discretion to refuse fees under sec. 1988 is "exceedingly narrow." Ellwest Stereo Theater v. Jackson, No. 80-7856 (5th Cir., August 17, 1981)(App.A1)

PETITIONER'S FIRST AMENDMENT RIGHTS WERE VIOLATED.

Finally, Respondent contends that no First Amendment violation can be found here, that this is a "garden variety zoning case" and that " deprivation of rights under a zoning ordinance is not sufficient to give rise to a substantive federal question." But First Amendment claims which are of substantial importance can arise in the zoning context, as the Court made clear this last Term in Schad v. Borough of Mt. Ephraim, ___U.S.___, 101 S.Ct. 2176 (1981), which is entirely ignored by Respondent. In Schad, Justice White declared: "(T)he zoning power is

not infinite and unchallengeable; it 'must be exercised within constitutional limits.'" Id., 101 S.Ct. at 2182. Petitioner does not contend that religious institutions are not subject to zoning ordinances, nor does it claim that the zoning ordinance at issue here is unconstitutional on its face, but that in its application in this case, a protected interest is involved and a valid First First Amendment claim arose. See Petition for Certiorari at 24-27.

Petitioner contends that Respondent's actions could only be justified by a showing of a compelling or substantial state interest and Schad supports the application of this test. Id., 101 S.Ct. at 2182-2183. Here, Petitioner had its special use permit unconstitutionally revoked and it lost its right of continued

worship on those premises and its expectation of uninterrupted worship. Respondent did not demonstrate any government interest sufficiently substantial or compelling to outweigh Petitioner's rights. Moreover, the Court in Schad pointed out that the presence of First Amendment discrimination would create a much more serious case and Petitioner contends that the actions of the City Council here discriminated against it on the basis of its religion. See Petition for Certiorari at 26-27. This Court should grant certiorari to determine that the activity here was protected and therefore, that Respondent could avoid a finding of deprivation of First Amendment rights only by demonstrating that a compelling or substantial interest existed for its actions.

CONCLUSION

Parratt and Schad support Petitioner's argument that the questions raised in its Petition for Certiorari are important and substantial federal questions. For the reasons discussed in this Reply Brief, as well as those included in the Petition for Certiorari, Petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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A P P E N D I X

A1

ELLWEST STEREO THEATRE, INC.,

Plaintiff-Appellant,

v.

Maynard JACKSON, et al.,

Defendant-Appellee,

DIXIE BOOKS, INC., et al.,

Plaintiffs-Appellants,

v.

CITY OF ATLANTA, Georgia, et al.,

Defendant-Appellees.

VRS INC., d/b/a Bookstore, et al.,

Plaintiff-Appellant,

v.

CITY OF ATLANTA, Georgia, et al.,

Defendant-Appellees.

A2

U.B. INC.,etc., et al.,

Plaintiffs-Appellants,

v.

Maynard JACKSON, etc., et al.,

Defendants-Appellees.

SHOWCASE CINEMAS, INC., etc.,

Plaintiff-Appellant,

v.

Maynard JACKSON, etc., et al.,

Defendants-Appellees.

No. 80-7856

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Unit B

August 17, 1981

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, and KRAVITCH and HATCHETT, Circuit Judges.

GODBOLD, Chief Judge:

Appellants, several adult entertainment establishments, sued appellees, the city of Atlanta and several of its officers in their official capacity, seeking declaratory and injunctive relief under 42 U.S.C. sec. 1983. They alleged that the city's adult establishment licensing ordinance violated the Constitution on several grounds. After a hearing the district court issued a preliminary injunction

and, upon submission of further briefs and evidence, permanently enjoined enforcement of several sections of the ordinance. Appellees did not appeal that judgment.

Appellants moved for attorneys' fees under 42 U.S.C. sec. 1988. Recognizing that appellants were prevailing parties under the statute, the district court nevertheless denied the motion on the ground that special circumstances rendered an attorney fee award unjust. The special circumstances relied on by the district court were: (1) appellees enacted the ordinance as part of a good faith effort to regulate adult establishments; (2) their good faith was bolstered by a decision of the Georgia

Supreme Court that the ordinance was valid, Airport Book Store Inc. v.Jackson, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979); (3) appellees did not appeal the grant of a permanent injunction; and (4) appellants were financially capable of absorbing the cost of their successful attack upon the ordinance.

Prevailing plaintiffs are entitled to attorneys' fees unless special circumstances render an award unjust, International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502, 503 (5th Cir. 1980). Although a district court's grant or denial of attorneys' fees is reviewable only for abuse of discretion, the discretion afforded district courts

to deny attorneys' fees to prevailing plaintiffs under sec. 1988 is exceedingly narrow, Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd., 643 F.2d 1034, 1041 (5th Cir.1981); Riddell v.National Democratic Party, 624 F.2d 539, 544 (5th Cir. 1980). None of the circumstances relied upon by the district court, either individually or collectively, amount to special circumstances justifying a denial of attorneys' fees. The good faith of government defendants acting in their official capacity is not a relevant factor for the district court to consider when determining whether special circum-

stances exist, see e.g., Aware Woman Clinic v. City of Cocoa Beach, 629 F.2d 1146,1149 n.3 (5th Cir.1980); Robinson v. Kimbrough,620 F.2d 468,478 (5th Cir.1980); Universal Amusement Co. v Hofheinz, 616 F.2d 202,204 n.1 (5th Cir. 1980).[1] Moreover, prevailing plaintiffs'

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1. As the district court noted, Universal Amusement is a case "strikingly similar to this one." In Universal Amusement this court reversed a district court's denial of attorneys' fees where plaintiffs had successfully challenged a city ordinance that prohibited the operation of adult establishments within 2000 feet of a church, school, or other educational or charitable institution. The district court sought to distinguish Universal Amusementby pointing out that the case relied upon by the panel in concluding that good faith was irrelevant, Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir.1978), stands only for the proposition that good

ability to pay is not a special circumstance rendering an award under sec. 1988 unjust, International Oceanic Enterprises, Inc. v. Menton, supra, 614 F.2d at 503, nor is defendant's decision not to appeal the injunction, cf. Aware Woman Clinic, supra, (defendants elected not to appeal merits yet panel reversed denial of attorneys' fees).

A previous state supreme court decision upholding Atlanta's adult establishment licensing ordinance is also not a special circumstance justifying a

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1. (cont.)
faith is not a controlling factor in deciding whether to award attorneys' fees. While Morrow may stand only for that proposition, Universal Amusement and its progeny clearly have extended Morrow and held that good faith is irrelevant, see Knights of Ku Klux Klan; Riddell; Aware Woman Clinic; Robinson.

denial of attorn ys' fees. Appellees reliance upon that decision is a specific articulation of good faith, but as we have noted, good faith is not relevant in determining whether appellants are entitled to attorneys' fees from appellees in their official capacity. Similar reformulations of the good faith argument have been rejected by this court. We have refused to recognize as a special circumstance defendants' reliance upon previous decisions from other jurisdictions upholding statutes similar to the statute under attack, Johnson v. State of Mississippi, 606 F.2d 635,637 (5th Cir.1979), and arguments that defendants' conduct was required by the state legislature, id.

We reverse the district court's denial of attorneys' fees and remand for an appropriate determination of the amount of the award, see Johnson v. Georgia Highway Express, Inc, 488 F.2d 714 (5th Cir. 1974).

REVERSED and REMANDED.